1-1-1989

Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions

Zygmunt J.B. Plater
Boston College Law School, plater@bc.edu

THROUGH THE LOOKING GLASS OF EMINENT DOMAIN: EXPLORING THE "ARBITRARY AND CAPRICIOUS" TEST AND SUBSTANTIVE RATIONALITY REVIEW OF GOVERNMENTAL DECISIONS

*Zygmunt J. B. Plater** and *William Lund Norine***

I. INTRODUCTION

The day-to-day realities of different systems of government can be discerned in the way they handle, in theory and practice, clashes between the individual and the collective will. The structure of contemporary American democracy is no exception. It is comprised of a variegated assortment of judicial formulae for balancing the interests of the individual and the state, most of these formulae tracing back with differing degrees of directness to textual bases in the first nine amendments to the federal Constitution or their state constitutional equivalents.[1] One of these basic structural balancings, encountered early on by every student of American law and government, is the vague limitation against "arbitrary and capricious" acts of governmental power.

* Professor of Law, Boston College Law School. A.B., 1965, Princeton University; J.D., 1968, Yale Law School; S.J.D., 1981, University of Michigan.

** Associate, Lord, Day & Lord, Barrett Smith, New York City. B.A., 1975, University of Minnesota; J.D., 1986, Boston College Law School. The authors would like to thank Scott Jordon, Esq., Boston College Law School Class of 1987, of Howrey & Simon, Washington, D.C.; and Rebecca Webber and Mark Cheung, Boston College Law School Class of 1989, for their tireless and indispensable assistance.

[1] This Article focuses primarily upon review of federal condemnation power, although, of course, the states' powers are subject to much the same analysis as they incorporate the fifth amendment under the fourteenth amendment. *See* Everson v. Board of Educ., 330 U.S. 1 (1947) (enforcing the establishment clause of the first amendment). Several states' constitutions incorporate the arbitrary and capricious test in specific terms. *See, e.g.*, KENTUCKY CONST. § 2; WYOMING CONST. art. 1, § 7.

The arbitrary and capricious test is a fundamental, but usually rather superficially considered, concept of limits upon state actions. Modern eminent domain law presents drastic and recently resurgent questions about the permissible limits of public power over private rights, and therefore invites, necessitates, and facilitates a clarification of the arbitrary and capricious test.

This Article, then, is straightforwardly schizophrenic, developing two different though linked inquiries. The analysis presented here requires a synthesis of two theoretical propositions: (1) that the arbitrary and capricious test can be clarified into a defined and judicially workable concept of substantive rationality review, and (2) that, if fifth amendment protections for private property rights in eminent domain cases are to be meaningful, the courts must be open to practical application of a clarified arbitrary and capricious review in state and federal condemnations.

A. Eminent Domain and Judicial Review

This Article is an attempt to explore and clarify the substantive inquiries into governmental action represented by the "arbitrary and capricious" concept, integrating these observations with the recent debate over rationality review, and applying them to the narrow but illuminating field of eminent domain. The analysis begins with a consideration of the resurgent police power issue of eminent domain condemnation through two analytical paradigms. Not coincidentally, deference to official decisionmaking permeates the courts' treatment of the field of eminent domain. The power of the public to appropriate private property via condemnation is a universal attribute of sovereign governments, clearly necessary to the functioning of a modern state.[2] As a result, governmental eminent domain decisions in the

[2] As the Court noted in Kohl v. United States, 91 U.S. 367 (1875):

> It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon

United States have generally received a most respectful reception in courts, both state and federal.[3] Given that the government concedes that it will pay just compensation for a taking, many courts in effect declare that they have no further questions.[4] The governmental agency's assertions of condemning authority, proper public purpose, and rational choice of means are, in practice, "well-nigh unassailable."[5]

Nevertheless, this judicial deference is somewhat surprising, especially in an era of supposed rugged individualism. Eminent domain condemnation represents one of the legal system's most drastic non-

---

> that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.

Id. at 371–72. Eminent domain thus is analytically a subset and constituent part of the police power in the state jurisdiction, and a "necessary and proper" adjunct of the federal government's correlative regulatory powers.

[3] *See, e.g.*, Falkner v. Northern States Power Co., 75 Wis. 2d 116, 248 N.W.2d 885 (1977); City of Jacksonville v. Griffin, 346 So. 2d 988 (1977); Wilson v. United States, 350 F.2d 901 (10th Cir. 1965); Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967); United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976); *In re* Heidelberg for Footpath, Alleyway and Bridge Purposes, 53 Pa. Commw. 321, 428 A.2d 282 (1981); Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923); United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946); Berman v. Parker, 348 U.S. 26 (1954).

[4] The general invulnerability of eminent domain appears to exist irrespective of which level of condemning authority is involved—federal, state, local, or public utility corporation. Analytically, as well, there are no meaningful differences between these condemnors. Each must have a proper grant of authority and must satisfy the other three categories of tests.

Judicial review of the rationality of the condemnor's site-selection choice is typically very deferential. In most cases, condemnees cannot require a specific showing why a particular site was chosen, but rather only a general showing that the choice of some such site was not arbitrary. *See infra* note 125. *Cf.* Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 225 A.2d 130 (1966), where the quasi-public character of the condemned parcel encouraged the court to permit review of site-specific rationality. *See* SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 216–28 (1970); McCarter, *The Case that Almost Was*, 54 A.B.A. J. 1076 (1968). The Colorado Supreme Court, however, has suggested that public utility condemnations may deserve more scrutiny than governmental takings. Arizona-Colorado Land & Cattle Co. v. District Court, 182 Colo. 44, 47, 511 P.2d 23, 24–25 (1975).

[5] *Berman v. Parker*, 348 U.S. at 35 (Douglas, J.) (as to review of public purpose). Justice Douglas also said, as to the choice of *means*:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Id. at 35–36.

penal incursions into the rights of individuals,[6] seizing private property, which has probably been more protected in the social fabric and legal structure of the United States than of any other country, past or present. Moreover, most such seizures expressly override the will of the owners subject only to a duty of compensation, which is often fundamentally unsatisfying to the condemnee.[7] Deference of a high degree seems to extend to all levels of condemnors, including even private utility companies.[8] In an Alice-in-Wonderland twist, moreover, the courts' basis for constricting judicial review of eminent domain takings, practically limiting review to the narrow question of whether there is a "public use," appears to be the constitutional language designed to extend special protection to private property rights in the first place.[9]

Especially today, as local governments are casting about for innovative uses of condemnation to hold onto beloved football teams,

---

[6] Uncompensated regulation is, of course, a major intrusion upon private property, but the takings clause and its active development and application by the courts in practice provides a protective limitation upon the exercise of such governmental power, always guaranteeing to the individual a reasonable remaining quantum of property and property use. *See* Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 206, 227–33 (1974) [hereinafter Plater, *Takings Issue*]. Other drastic non-criminal governmental powers include deportation and administrative denials of government largesse, but these too have developed fairly elaborate constitutional limitations. *See, e.g.*, Wong Yang Sun v. McGrath, 339 U.S. 33 (1950); Goldberg v. Kelly, 397 U.S. 254 (1970).

[7] Indeed, given the unique nature of land, it is in some cases difficult to categorize the financial settlement as "compensation." *See, e.g.*, Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966) (sovereign need only pay for what it actually takes, rather than for all that owner has lost); United States v. Virginia Elec. Power Co., 365 U.S. 624 (1961) (navigational servitude permits government to condemn riparian lands without compensating for value arising from riparian location); Winston v. United States, 342 F.2d 715 (9th Cir. 1965) (compensation is measured by what government takes, not what owner loses).

Eminent domain compensation makes no necessary provision for sentimental or personal values in property, for aesthetics except as they are a function of the taste of potential purchasers in the real estate market's valuation, for transaction costs such as relocation, and replacement values, except insofar as is statutorily required. *See* 3 NICHOLS ON EMINENT DOMAIN § 8.6 (rev. 3d ed. 1985) [hereinafter NICHOLS]. Eminent domain, of course, is not directed only toward governmental acquisition of land. *See, e.g.*, United States v. Cors, 337 U.S. 325 (1949) (condemning a tugboat); Cordova v. City of Tucson, 16 Ariz. App. 447, 494 P.2d 52 (1972) (condemning historical artifact); Miller Levee Dist. v. Wright, 195 Ark. 295, 111 S.W.2d 469 (1920) (condemning easement of view). A review of the digests, however, indicates that the overwhelming majority of eminent domain actions involve the taking of some ownership rights in land, be it short-term or permanent, fee simple or lesser interests.

[8] *But cf.* Arizona-Colorado Land & Cattle Co. v. District Court, 182 Colo. 44, 47, 511 P.2d 23, 24–25 (1975).

[9] Taken contextually, the fifth amendment takings clause, in its terms, is drafted so as to provide further protections *beyond* due process rather than constriction of the individual's right to property. *See infra* notes 44–45 and accompanying text.

local job-producing industries,[10] and other nontraditional quasi-public assets, eminent domain not only deserves further attention from legal scholars, but is also likely to get it. And the Supreme Court, perhaps without realizing it, has opened the door wider to rationality review of condemnation decisions.[11]

B. The Arbitrary and Capricious Test and Rationality Review

After reviewing the police power issue of eminent domain, this Article shifts to broader ground, developing the fundamental proposition of substantive review of arbitrariness. The analysis begins with an examination of substantive nonstatutory reviews of governmental police power actions, including eminent domain actions, arguing that all such substantive judicial inquiries can be separated analytically into four different diagnostic categories: questions of (1) *authority*; (2) of *proper public purpose;* (3) of reasonable relationship of *governmental means to ends* as a matter of logic on the merits; and finally, (4) of the particular *burdensome effect on the individual* imposed by the governmental actions. Typically, the latter question of takings burden reduces in eminent domain cases to the issue of just compensation.[12]

These categorical distinctions seem logical, and help to clarify much of the confusion in the area. The arbitrary and capricious rubric has been applied broadly in *all* of these categories, to the benefit of none. It is in the third area, however—substantive merits review of the means-end relationship, asking the question, "is the governmental action logically designed to achieve a purpose?"—that the arbitrariness test has its most useful meaning and application. Unfortunately, this direct sense of the term is in practice rarely explored in clear terms by the courts. The courts bob and weave, duck and

---

[10] *See, e.g.*, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). Other cities have reportedly considered condemning manufacturing facilities.

[11] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). *See* text accompanying note *infra* 166.

[12] These analytical categories have been used in similar form before by one of the authors. Plater, *Takings Issue, supra* note 6, at 223–28. With the addition of the initial authority inquiry, they provide a useful analytical matrix for review of all police power actions. Although these precise categories do not seem to have been so set out previously, they clearly derive from the work of many courts and commentators. Note also that this breakdown of inquiries serves in other review contexts, as in dormant commerce clause cases where the burden on the individual is analogous to the burden on interstate commerce. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

In speaking of the police power here, the authors refer not only to state exercises of that power but also to the federal government's exercise of its correlative regulatory powers.

shuffle, trying to avoid confronting substantive questions of arbitrariness in judicial review of governmental decisions.

Drawing upon administrative law, this Article argues that an existing, workable judicial test of arbitrariness ultimately comes down to the question whether a rational official could have reached the challenged decision on the given facts, a test that is practically indistinguishable from Justice Frankfurter's classic formulation of the substantial evidence test.[13] This formulation appears to be workable, deferential, and useful, linking the present inquiry to the rationality review debate.

After examining the rationality review debate, the Article argues for the practicality and legitimacy of substantive due process rationality review, properly defined, noting that such review currently takes place anyway under different names. The Article also discusses the degree of deference appropriate to rationality review. Deference, of course, is a proper fundamental inclination of courts when reviewing the actions of legislatures and their administrative agency creations. Questions of separation of powers, ideologies of judicial passivism, political pressures, and systemic efficiency all argue for judicial hesitancy in second-guessing the other branches of government. If deference effectively comes to mean nonreviewability, however, the judiciary has abdicated its constitutional duties.[14] Thus, the meaning and application of the arbitrary and capricious test deserve serious and extensive scrutiny.

C. A Theoretical Synthesis

By putting the two inquiries together—"arbitrary and capricious" rationality review and eminent domain—the path may be made a bit

---

[13] "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (citing and construing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). *See infra* note 224 and accompanying text.

[14] "On issues of substantive review, on conformance to statutory standards and requirements of rationality, the judges must act with restraint. Restraint, yes, abdication, no." Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1975) (Leventhal, J., concurring). As to statutes, moreover, "courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown Food Store, 380 U.S. 278, 291 (1965). "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965). A similar view is expressed by Justice Marshall writing for the Court in Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973); *see also* Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968).

clearer and smoother toward understanding governmental limitations in the theoretical structure of American democracy. Eminent domain offers not only a setting in which to clarify the elements of substantive judicial review, but a litmus test of their practical applicability as well.

In appropriate cases, courts may increasingly allow condemnees a practical opportunity to question the rational basis of particular eminent domain decisions. If courts are willing to consider the substantive rationality of governmental action, they thereby implement in practice a longstanding precept of American jurisprudence. If, in contrast, courts treat the traditional presumption of validity as effectively irrebuttable, refusing to listen seriously to the merits of arbitrariness challenges, then the long-term consequences to our democratic system are likely to be felt far beyond their effect on certain parcels of land.

II. Two Presenting Paradigms

A. Background of the "Arbitrariness" Inquiry

The arbitrary and capricious standard[15] appears to derive from both statutory and constitutional roots, although it does not appear in the United States Constitution or most state constitutional texts.[16]

[15] This Article analyzes the separate constitutional basis for the test, beyond its various statutory incarnations such as the federal Administrative Procedure Act (APA), § 10(e)(A), 5 U.S.C. § 706(2)(A) (1982).

"Arbitrary and capricious" is referred to herein as one test, not two. "Capricious," according to Webster's, means "action arising from unrestrained exercise of the will, caprice or personal preference . . . based on random or convenient selection or choice, rather than on reason or nature . . . given to willful irrational choices and demands." "Arbitrary," as noted later herein, *see infra* note 224 and accompanying text, comes down to the same fundamental lack of determining principle. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 333 (1981). The concepts of unreasonableness and, in some cases, bad faith, also reflect the arbitrary and capricious test and are treated here as part of the same standard. *See infra* note 358 and accompanying text.

This Article focuses on the rationality review of governmental agency actions, rather than of statutes. The standards of review are similar for the two settings; but it would seem that a difference lies in different degrees of deference. *See* Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783, 785 (1966).

[16] This Article proposes that the arbitrary and capricious test be straight-forwardly recognized as constitutionally-based, as an element of due process. As the Supreme Court said in *Whalen v. Roe*, pending legislative experiments,

> Mr. Justice Brandeis' classic statement of the proposition merits reiteration . . . "We may strike down the statute . . . on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure."

It is generally understood to constitute a democratic backstop to potential excesses of state power. In other words, governmental actions should ultimately be reviewable in court under the deferential but substantive constraint that, if proved to be arbitrary, capricious, or in bad faith, they will be declared void.[17] This principle holds great structural and philosophical significance, obviously linked to the concept of due process.

Remarkably, for a test so putatively basic, there are relatively few cases, especially federal cases,[18] in which the concept is used straightforwardly to strike down governmental actions as arbitrary and capricious on substantive (as opposed to procedural) grounds.[19] The phrase flourishes as dicta but seems to wilt as a support for judicial holdings, except in the negative sense where courts uphold challenged official acts upon the finding that they are *not* arbitrary.[20]

---

429 U.S. 589, 597 n.20 (1977) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). The Court quoted this assertion specifically despite the fact that "*Lochner* has been implicitly rejected many times." *Whalen*, 429 U.S. at 597.

> The terms "arbitrary" and "capricious" embrace a concept which *emerges from the due process clauses of the Fifth and Fourteenth Amendments* of the United States Constitution and operates to guarantee that the acts of government will be grounded on established legal principles and have a rational factual basis. A decision is arbitrary or capricious when it is not supported by evidence or when there is no reasonable justification for the decision.

Canty v. Board of Educ., 312 F. Supp. 254, 256 (S.D.N.Y. 1970) (footnote omitted and emphasis added); *see also* Richardson v. Belcher, 404 U.S. 78, 84 (1971); *cf.* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 490 n.57 (3d ed. 1986) (citing Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977) (asserting that the Court has not clearly accepted the constitutional status of the arbitrariness test)).

[17] "[T]here is no place in our Constitutional system for the exercise of arbitrary power." Garfield v. United States, 211 U.S. 249, 262 (1908). This assertion is given eloquent lip service in many cases involving judicial review of legislative/administrative decisionmaking. *See, e.g.*, General Protective Comm. v. Securities & Exchange Comm'n, 346 U.S. 521 (1954); Jones v. City of Portland, 245 U.S. 217 (1917); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Bush v. Martin, 251 F. Supp. 484 (S.D. Tex. 1966).

[18] This Article notes several areas in which state courts have undertaken substantive rationality reviews in ways quite different from federal courts, in inquiries as to less drastic means, *see infra* notes 242–58 and accompanying text, legislative "necessity," *see infra* note 119 and accompanying text, and eminent domain "necessity," *see infra* note 106 and accompanying text.

[19] A few such cases noted *infra* do exist, giving a passing mention of the meaning of "arbitrary" or even saying that an action is impermissibly arbitrary. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). *State Farm*, however, is an example of how even such cases may cloud the point; the Court held the NHTSA airbag rescission "arbitrary" primarily because NHTSA failed to *explain* adequately the basis of decision, hardly a direct substantive judgment on the rule. *State Farm*, 463 U.S. at 44, 46.

[20] Or remanded for further development of the record, without being nullified, as in Citizens

The arbitrariness inquiry rarely functions as an active judicial test of the validity of governmental acts. Rather, when a judicial opinion begins its review of governmental action by choosing to apply the "arbitrary and capricious" level of scrutiny, that fact usually telegraphs the likelihood that the official act or decision is shortly to be upheld.[21] When courts do use the "arbitrary and capricious" phrasing actively, moreover, they almost never define it analytically. Instead, they apply it to such a disparate range of analytical inquiries that the phrase emerges as an amorphous and scarcely useful evaluative concept. Scholars have not done much better.

A primary reason for the dearth of cases actively applying the arbitrary and capricious test may well be that the concept is poorly understood. Yet a concept as widely acknowledged as this one would seem to deserve critical exploration. The "arbitrary and capricious" test is so much a part of judges' accepted notions of judicial review that it serves as a useful vehicle for active exploration of theories of substantive judicial review. When persons have been severely affected by extreme governmental actions, it seems constitutionally fitting—not just a matter of statutory caprice—that they have a meaningful opportunity to attempt to rebut the traditional presumption of the validity of governmental acts, with a court willing to listen to the merits of arguments that the official decision was arbitrary, capricious, or irrational.

"Rationality review" has enjoyed a fair amount of rather theoretical discussion recently, and is closely linked to the arbitrary and capricious test.[22] Little of this rationality review debate, however, has trickled down into judicial opinions. In part, this dearth may be attributable to the profession's commendable and longstanding av-

---

to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The same shorthand works in equal protection cases where the choice of arbitrary and capricious review telegraphs the lowest level of scrutiny. *See infra* notes 306–20 and accompanying text; *see also* United States v. Meyer, 113 F.2d 387, 392, *cert. denied*, 311 U.S. 706 (1940); Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 169–70 (1982).

[21] On administrative "questions of law," the judicial review is far more likely to be phrased in terms of the appropriateness of judicial substitution of judgment than in terms of arbitrariness, raising issues that similarly turn on degrees of deference.

[22] *See, e.g.*, Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (1979).

ersion to judicial exercises of substantive due process "*Lochner*ing."[23] In part, it may be due to the unpredictable vagaries of the concept of reasonableness (one of those universal "weasel words" learned early on and regarded skeptically by most Anglo-American lawyers because it is so difficult to define how a reasonable mind thinks in a complex world). Yet, on both counts, the courts' discernible hesitancy in reviewing rationality or arbitrariness seems anachronistic. Courts and scholars have in fact evolved ways of handling the demands of rationality and substantive due process review, although without much semantic clarity or explicit recognition of the process.

Two not-so-hypotheticals[24] illustrate two basic models of rationality/arbitrariness review. These paradigms, the first a means-end "factual implausibility" model and the other a "rational alternatives" model, could have been drawn from a wide variety of subject matter areas—from judicial review of Securities and Exchange Commission or Federal Trade Commission regulations, awards of governmental contracts and licenses, or different kinds of rulemaking.[25] Eminent domain, however, offers a relatively narrow and relatively simple field, unencumbered by any elaborate structure of adjectival rules and regulations, that nevertheless possesses fundamental importance and so can serve as a useful lesson in substantive review.

B. A Means-end Factual Implausibility Model

In the first paradigm, a governmental condemnation decision is made in order to achieve an explicit and proper public purpose, but

---

[23] Lochner v. New York, 198 U.S. 45 (1905); *see infra* notes 260–79 and accompanying text.

[24] The examples are based, first, on the Tennessee Valley Authority's two most recent reservoir condemnations: for the Tellico Project on the Little Tennessee River and for the Columbia-Normandy Projects on the Duck River. *See* United States *ex rel.* TVA v. Two Tracts of Land, 387 F. Supp. 319 (E.D. Tenn. 1974), *aff'd*, 532 F.2d 1083 (6th Cir.), *cert. denied*, 429 U.S. 827 (1976); Plater, *Reflected in a River, Agency Accountability and TVA's Tellico Dam*, 49 TENN. L. REV. 747 (1983) [hereinafter Plater, *Tellico Dam*]. Second, they are based on the City of Detroit's condemnation for General Motors (GM) of more than 1000 homes in that city's Poletown district. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); *see also* Michigan Media Services, Inc., *Poletown Lives*, Ann Arbor, Michigan (documentary film 1983); Crosby v. Young, 512 F. Supp. 1363 (E.D. Mich. 1981).

The first-named author played a substantial role in the *TVA* litigation and an ancillary role in the *Poletown* and *Crosby* cases. The eminent domain issue presented in this Article was not raised in the Tennessee litigation and received only passing attention in the *Poletown* setting, so this Article does not in effect relitigate old battles.

[25] *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 204 N.E.2d 504 (1965); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Warner-Lambert v. FTC, 562 F.2d 749 (D.C. Cir. 1977).

the condemnees challenge the likelihood of that taking ever serving that purpose because of a basic lack of factual support. For example, assume that a federal agency with a clear grant of authority to condemn for statutory purposes, and an express statutory mandate to "promote regional economic development and water recreation," decides to build a public works project centered upon a dam and reservoir that will flood 8000 acres of river-valley lands.[26] In rational-basis terms, there can be no realistic legal challenge to the forced sale of these 8000 acres and perhaps another 2000 acres necessary for use and operation of the reservoir. Taking those 10,000 acres is a direct and rational means for achieving the purposes of creating a reservoir. Assume that the agency, however, seeks to condemn a further forty square miles of adjacent land beyond the reservoir pool and service area, with the avowed objective of "shoreland industrial development," promoting the location of new water-based private industry in the area and new towns to serve the industrial parks.[27]

---

[26] In this hypothetical, as in the *TVA* cases, *supra* note 24, no congressional authorization is required for the decision to construct a public works project. Congressional contact is limited to the annual appropriations bill, in which lump sums are granted to construction agencies without line-item specification. Thus, this eminent domain paradigm does not require direct judicial review of a congressional decision, but rather scrutinizes an internal agency decision.

[27] By acquiring more than sixty square miles for the Tellico project, only 16,000 acres of which would be flooded even during the summer, TVA projected that it could resell up to 35 square miles of condemned farmlands to a hypothetical industrial city to be called "Timberlake," to be built by the Boeing Corporation with congressional subsidies. Timberlake was to be named after the first British officer to map the region, and was patterned after a model Minnesota city designed by Athelstan Spilhaus which also was never built. Timberlake was projected to require between $250 and $800 million in subsidies that were not included in the Tellico cost projections. The speculative land profits and the revenues from the hypothetical city would provide the project's official shoreland benefits. The other major projected Tellico benefit was recreation in the project area, a benefit based upon annual recreation revenues and economic activity. *See* Plater, *Tellico Dam*, *supra* note 24, at 754–57.

These projections reflect the fact that federal projects must be justified as profitable by official cost-benefit projections in order to obtain funding. S. Doc. No. 97, 87th Cong., 2d Sess. 7–12 (1962). *See* Plater, *Tellico Dam*, *supra* note 24, at 752 n.13. Economic projections that accompany pork barrel projects often strain credulity, but courts have strenuously avoided review of cost-benefit numbers or the accuracy and logic of agency accounting formulas, despite strong objections from economists and citizen critics of government pork barrel projects, on the ground that they are internal requirements to which extreme deference is appropriate. *See, e.g.*, Environmental Defense Fund (EDF) v. TVA, 371 F. Supp. 1004, 1014 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974); EDF, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 739–40 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); United States v. West Virginia Power Co., 122 F.2d 733, 738 (4th Cir.), *cert. denied*, 314 U.S. 683 (1941); Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 412–14 (W.D. Va. 1973); EDF, Inc. v. Corps of Eng'rs, 348 F. Supp. 916, 924–25 (N.D. Miss. 1972). *But see* Montgomery v. Ellis, 364 F. Supp. 517, 532–33 (N.D. Ala. 1973). The official cost-benefit ratios are thus not a satisfactory basis for general discussion of rational-basis review, although this analysis may

This hypothetical is, in fact, the case of the Tennessee Valley Authority's ongoing Columbia Dam on the Duck River, as well as that of the recent Tellico Dam imbroglio. In these circumstances, the 300 families whose forty square miles of farm land are being condemned for future non-reservoir shoreland development would typically voice a barrage of complaints: that this is "a land-grab," a taking of private land to be turned over to other private interests, a taking of "excess" land, a "socialistic" governmental land speculation, and so on. Defense attorneys in eminent domain cases have turned all of these kinds of verbal complaints into defensive legal arguments, all focused on alleged improper public purposes, and all dead losers.[28]

Assume, however, one more fact: that the agency has previously used exactly the same rationale to condemn and hold a total of more than 200 square miles of non-reservoir dryland parcels in four other neighboring public works dam projects over the past twenty-five years, *and that virtually no such industrial development has occurred therein.*[29] The condemnation defendants realistically cannot argue that industrial development is not a proper public policy or public purpose, but they do now have available a further argument: that they should be able to go forward with an offer of proof that condemnation of their lands is not rationally related to the accomplishment of the agency's expressed public purpose. That is, whereas a court initially could well have deferred to the agency's "experience and expertise" or "experimentation"[30] as bases for allowing the first

---

often lead to similar conclusions. Prior to the 1950s, the courts held to a rough distinction between public use and mere public purpose. *See, e.g.*, People v. Chicago Land Clearance Comm'n, 14 Ill. 2d 74, 85, 150 N.E.2d 792, 798 (1958) (Klingbiel, J., dissenting) (citing the then current 18 AM. JUR. EMINENT DOMAIN § 36, at 663 (1948)).

[28] The leading case in which condemnation for redevelopment under private ownership was deemed a sufficiently "public" use is Berman v. Parker, 348 U.S. 26 (1954). *See infra* note 74; *see also* United States v. 416.81 Acres of Land, 514 F.2d 627 (7th Cir. 1975); United States v. 67.59 Acres of Land in Huntington County, Pa., 415 F. Supp. 544 (M.D. Pa. 1976); Gibson & Perin Co. v. City of Cincinnati, 480 F.2d 936 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973).

[29] The model is clearest when absolutely no industrial development has previously occurred in similar projects. If some has occurred, the factual questions of how much new development is attributable to the project and how much would have come to the region anyway are presented. This complicates the factual analysis, though legally its resolution ultimately follows the substance of the general analysis presented here.

[30] Borden Co. v. Freeman, 256 F. Supp. 592 (D.N.J. 1966); Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973). The subject of lessened judicial scrutiny for "experimental" programs does not appear to have received, but deserves, scholarly attention. *See* Whalen v. Roe, 429 U.S. 589, 597 (1977).

shorelands development projects, now that the factual record clearly shows the implausibility of ever achieving those purposes, private property owners must be allowed at least a practical chance to challenge the rational basis of such condemnations in court.

The private property owners would then attempt to produce a substantial quantum of evidence based on actual practical experience, demonstrating that the condemnation of their parcels did not actually serve the purpose of shoreland industrial development.[31] If the agency can produce no substantial evidence to the contrary, then a court would seem justified in holding, deferentially but true to its constitutional mandate, that reasonable, present-day agency officials could not have decided that that particular land condemnation would serve to accomplish the project's purpose. The court would then dismiss the condemnation action. Faced with such a judicial decision, the agency would have to abandon the condemnation action, or develop some further express public purpose that could be justifiably served by the condemnation. Development of a further purpose might achieve only the window-dressing of a new, amended declaration of purpose, but it would have the significant virtue of being explicit and open to public scrutiny with the practical results that may follow.

In brief, the private property owners' defense is that, based on the factual record, no governmental official could reasonably believe that the governmental choice of means—condemnation of these lands—would achieve the avowed governmental ends of industrial development for the valley. Such a case is not a question of "excess condemnation";[32] rather, it is a case straightforwardly questioning

---

[31] Absolute proof, of course, is never possible. The question of "not at all, ever" is so strict as to amount to total deference. Rather, this proof would show that no *substantial* water-based development was likely to develop over the project's projected life. This involves a balance, an implicit cost-benefit comparison, that says that development causally attributable to this project is not likely to come in a quantity sufficient to justify the taking. The defense is *not* an "excess condemnation" claim, but rather an attack on the merits. Where minor additional increments of land occur as adjuncts to taking, it would appear that, as Justice Sutherland said in another context, "[t]he inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388–89 (1926).

[32] "Excess condemnation," the condemnation of extra adjacent lands beyond those directly required for the particular governmental function, is almost universally upheld by courts when it is accessory to the basic taking, and avoids split and landlocked parcels, avoiding access problems, and even recoupment takings. *See* Armstrong v. City of Detroit, 286 Mich. 277, 282 N.W. 147 (1938); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 14

the rational basis of the condemnation's basic shoreland development premise itself.

The fundamental problem of modern eminent domain law, however, is that, at least in practical terms, under the deferential standard of review applied in condemnation takings the defendants in most federal courts today would not be able to take even this first step. The agency's discretion and the rationality of its decisions to condemn, short of lunacy, are supported in court by a practically irrefutable presumption of validity. Many state courts, though by no means all, follow the federal courts' extremely deferential example.[33]

C. A Rational-alternatives Model

The second paradigm requires the reviewing court to apply the rationality rule in a contextual setting, reviewing how an agency has chosen between several competing alternatives that admittedly would each achieve the public purpose. The recent *Poletown* case from urban Detroit illustrates this paradigm.[34]

Assume that a federal redevelopment agency, working through the auspices of a city government, decides to encourage the construction of a new job-creating, manufacturing plant within city limits. It decides to condemn and raze an urban neighborhood of fifty square blocks, containing 1100 homes, twenty stores, and two churches, causing a substantial amount of personal and commercial distress, in order to turn over the 500 acre parcel to a major automobile manufacturer for construction of a Cadillac assembly plant.

The property owners might, as usual, attack the taking as based on an improper public purpose—a "private use," for example—and, as usual, would lose.[35] They might argue further that condemnation payments will never provide sufficient funds for replacement of their homes and businesses at relocated sites, but, in the absence of special

---

Cal. Rptr. 899 (1961); State *ex rel.* Sharpe v. 0.6033 Acres of Land, 110 A.2d 1 (Del. Super. Ct. 1954).

[33] *See* cases cited *supra* note 3.

[34] This "rational alternatives" model is essentially based upon the circumstances that gave rise to Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam); *see also* Crosby v. Young, 512 F. Supp. 1363, 1374 (E.D. Mich. 1981). For a factual chronicle of *Poletown*, see *Poletown*, 410 Mich. at 645–60, 304 N.W.2d at 464–71 (Ryan, J., dissenting). For an urban historian's description of the case, see Bukowczyk *The Decline and Fall of a Detroit Neighborhood: Poletown vs. GM and the City of Detr* ., 41 WASH. & LEE L. REV. 49 (1984).

[35] *See* cases cited *supra* note 28. In fact, aside from a brief attempt to use the state's environmental protection act, the entire state appeal focused fecklessly on alleged private use. *Poletown*, 410 Mich. at 637–38, 304 N.W.2d at 461 (Fitzgerald, J., dissenting).

statutory provisions, this argument also fails because just compensation is assessed according to the market value of what is taken with no guarantee of relocation or replacement costs.[36]

Assume further, however, that, at the time the officials decided to condemn and raze the neighborhood, there were four other empty industrial sites of 500 acres each available within city limits with equivalent access to rail, highways, and utilities.[37] The landowners may now make a further argument: that, given the drastic burden imposed upon them, and the available alternative sites that cannot be rationally distinguished from their neighborhood's site (except that they are *less* expensive to develop given the cost of condemnation to the city), no official could rationally have chosen to condemn their homes and businesses rather than to go to one of the other four open sites.[38]

---

[36] *See* Winston v. United States, 342 F.2d 715 (9th Cir. 1965). In *Poletown*, some relocation assistance was available. 410 Mich. at 655–56, 304 N.W.2d at 469 (Ryan, J., dissenting).

[37] The Poletown environmental impact statement (which was drafted on an irregularly expedited emergency basis, *see Poletown*, 410 Mich. at 652–53, 304 N.W.2d at 468 (Ryan, J., dissenting); Comment, *Emergency Exceptions from NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481, 485–90 (1987)) identified nine potential sites for the Cadillac factory, but, from the beginning, General Motors' site criteria were so particular to the Poletown site that only it would fit. The company demanded "an area of between 450 and 500 acres; a rectangular shape (3/4 mile by 1 mile); access to a long-haul railroad line; and access to the freeway system." 410 Mich. at 636, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).

Never clarified in the legal battle was the fact that others of the nine potential sites were basically "green field" sites fitting all but the rectangular criterion. In addition, they were also empty of houses, churches, and small businesses and thus available without the massive disruption of Poletown; but that all were rejected at GM's insistence, basically because they were not rectangular. Was shape a critical or a superficial requirement? When Detroit's planning office staffers inquired informally of GM, they were told that the corporation was insisting on a rectangle so that it could use the same blueprint layout of parking lots and assembly units as at an existing GM plant in Oklahoma. But could not the design of parking lots be shifted to fit the shape of the existing Detroit industrial sites? They could, the GM staff said, or a parking structure could be built instead of open lots to accommodate the plant workers' needs at the less disruptive sites. But GM adamantly refused to consider shifting the parking lot layout or building a parking structure. The latter could cause congestion, and either would require a modification of the Oklahoma blueprints, which the company simply declined to do. "Once we had decided what we wanted, we would not retrench," said one GM employee.

The question of "specific contextual necessity," considered later in this Article, in the Poletown setting, then, came down to whether the creation of jobs and tax base (admitted *arguendo* to be proper public purposes) required that a rural Oklahoma factory layout design be replicated in an urban Detroit neighborhood without any modifications.

The authors are indebted to a member of the GM corporate legal staff, and to the late Susan Rupe, Wayne State Law School Class of 1980, who was a member of the Detroit municipal planning department staff, for illumination of this part of the *Poletown* story.

[38] In fact, in the *Poletown* case the actual motivation for the government's particular choice (other than bruited reverse racial discrimination issues, the mayor and council being largely

Such an argument is *not* a means-end argument that the condemnation of Parcel A will not in fact or logic serve the avowed public purpose of industrial development, but rather that, viewed in the factual context of drastic costs and available alternative sites B, C, D, and E, no rational official could have picked A. This version of rationality review is analytically more complex and difficult, dealing not with a basic factual implausibility but with a judicial cost-benefit-alternatives review. In effect, it involves judicial acknowledgment of a "less-drastic-means" inquiry in reviews of some governmental condemnation actions. Deference to governmental decisions is an even greater consideration here, but the fundamental question remains: if to serve the legitimate, expressed public purpose of industrial development a site must be chosen, but in light of the dispro-

---

black and the neighborhood largely white) appears to have been GM's unyielding insistence on the Poletown site so as to be able to duplicate the precise dimensions and layout of the Oklahoma plant. *See supra* note 37.

Corporations wield great political leverage in making relocation decisions. *See* B. BLUESTONE, CORPORATE FLIGHT: THE CAUSES AND CONSEQUENCES OF ECONOMIC DISLOCATION (1981). In the *Poletown* case, GM straight forwardly threatened to transfer its Cadillac factory out of the Detroit area to the Sunbelt if its particular demands were not met. *See* 410 Mich. at 648–51, 653–57, 304 N.W.2d at 465–66, 468–69 (Ryan, J., dissenting). The threat appears to have been a bluff. At the time, the first-named author checked with the federal Environmental Protection Agency and determined that GM had not moved to secure the basic environmental clearances necessary to transfer operations to southern states within the time frame necessary to fit the constraints of its construction schedule. Detroit city officials, however, knew of this, but apparently dared not question GM's insistence.

This background defines two further questions:

(a) In determining the rationality of the choice of site, an inquiring court might have asked how the design could have been adjusted to fit other sites. This Article later assesses a court's ability to review the asserted "necessity" for particular sites. Would GM's desire "to see the river" justify a decision to condemn on the waterfront, with no other distinguishing preference criteria? The inquiry would amount to a form of cost-benefit accounting, in light of heavy private condemnation burdens, to determine contextual "necessity." This form of assessment is common in modern equal protection analysis. *See infra* notes 121, 307 and accompanying text.

(b) If city officials chose the neighborhood site purely because of corporate insistence that otherwise the factory would take its money and go elsewhere—without the hint of a logical rationale—would that fact itself not provide a sufficiently rational basis for the choice? Faced with an irrational ultimatum, a rational city might well choose to go with the flow. Yet ultimately the condemnation power decision is made by the government, not the corporation, so, analogous to cases in which courts profess greater scrutiny in cases where power is delegated to private corporations, a court should scrutinize the rationality of a vicariously delegated choice less deferentially. Justice Ryan, in his *Poletown* dissent, wrote the only opinion recognizing this "corporation-dictated necessity" issue, and found legal grounds to reject the assertion. 410 Mich. at 675–81, 304 N.W.2d at 478–80; *see also* Arizona-Colorado Land & Cattle Co. v. District Court, 182 Colo. 44, 511 P.2d 23 (1973). If the government had delegated eminent domain power directly to GM, a court might well have inquired more deeply into the choice of the site. By co-opting the agency, the corporation should not be able to win a lower level of rational scrutiny, in a pass-the-buck cycle of decisionmaking.

portionate private and public burdens no rational official could have thought that Parcel A was preferable for that legitimate purpose, does not a defendant have the right to ask a court to scrutinize the substance of the condemnation decision and rescind it if it fails the test?

D. The Paradigms

In sum, the two paradigms present instances in which private property owners would want at least the opportunity to go forward with the burden of proving that a governmental decision is not rational, in terms showing that a rational official could not so have decided. In both these paradigms, however, the "arbitrary and capricious" standard would be honored in the breach. Federal courts currently do not take on a particularized rational-basis scrutiny of governmental condemnation decisions, but instead defer in general terms to the exercise of official discretion, leaving condemnation defendants with no practical substantive review of takings decisions.

The paradigms are admittedly rather extreme examples of eminent domain condemnation, but such cases permit clearer insights into condemnation review. Lest they be thought hyperbolic, moreover, it should be remembered that both have actually occurred and may well occur again.[39] In addition, although both paradigms address agency decisions rather than legislative acts, both are set in the federal jurisdiction so as to test the most stringent current restrictions of judicial review. In both cases, moreover, if defendants are prevented by deferential courts from going forward with proof, they are left with the hapless prospect of political petition and media action, neither of which is very effective in protracted attempts to buck the flow.[40] In each paradigm, the hypothetical is constructed

---

[39] The TVA is currently trying to proceed with the Duck River dam at Columbia, Tennessee, condemning 31,800 acres of farmland and 260 farm families, for an impoundment of 12,600 acres in the summer and 4000 acres in the winter, on the hypothesis that industry will thereby come. Even with the hypothetical industrial development, the Columbia dam has, even in TVA's own reckoning, never had a positive cost-benefit ratio. *See* H.R. REP. NO. 1533, 96th Cong., 2d Sess. (1980).

[40] The Court is often seen as the last best hope for individual citizens seeking to assert fundamental constitutional rights against the potential tyranny of majoritarianism. It provides a reflective check on the process of legislative logrolling. As Milton Shapiro writes:

> [T]he Court can sometimes intervene successfully on behalf of interest groups that lack influence elsewhere in government . . . . It is these marginal groups, who . . . find it impossible to gain access to the "political" branches, which the Court can best serve.

M. SHAPIRO, FREEDOM OF SPEECH, THE SUPREME COURT AND JUDICIAL REVIEW 32 (1966).

so as not to be so crazy as to constitute obvious official bad faith or lunacy.[41] Finally, in each case the governmental project has a clearly delineated public purpose upon which the condemnation's rationality may be assessed; the only question is rationality.

Ultimately, then, the paradigms are designed to demonstrate situations in which laypersons would think that judicial review is both practical and desirable, but in which court-made rules of deference block any such attempt. The examples are designed to present practicable litigation cases. In each case, the court's deference is the problematic element. If a court agrees to take on substantive review on the particular merits, the subsequent course of review would be relatively straightforward and unremarkable.

III. ARBITRARINESS REVIEW IN THE EMINENT DOMAIN

Despite the drastic nature of eminent domain condemnation, and the widespread political expressions of aversion it inspires,[42] eminent domain cases in practice constitute remarkably cut-and-dried judicial consecrations of governmental decisions.[43] Aside from occasional ineffective attacks on the "public use" issue, most condemnation defendants are left with nothing practicable to argue about except the amount of the compensation check. In effect, the courts have taken the fifth amendment eminent domain language—which was designed as an additional protection against the excesses of governmental takings by emphasizing the two concepts of public use and compensation[44]—and inverted the clause so as to limit judicial review

---

[41] A court's invalidation of a statute or regulation on the ground that it was grossly irrational or "lunatic," of course, still concedes the legitimacy of substantive rationality review, and also clearly constitutes a constitutional review that sounds in due process. It is also useful to note that, notwithstanding a deluge of ill-spent judicial ink to the contrary, the terms "bad faith" and "arbitrary and capricious" are not synonymous. The term bad faith "is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong, because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design of ill-will." BLACK'S LAW DICTIONARY 127 (5th ed. 1979) (quoting Stath v. Williams, 174 Ind. App. 369, 375, 367 N.E.2d 1120, 1124 (1977)).

[42] Reluctance to use the eminent domain power is widespread especially in self-styled "conservative" administrations.

[43] *See supra* notes 3–5 and accompanying text.

[44] There is a large body of professional literature devoted to the science of evaluating and proving what constitutes "just compensation" in a given case. 3 NICHOLS, *supra* note 7, § 8; 4 NICHOLS, *supra* note 7, §§ 12, 13; J. GELIN & D. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN, § 3 (1982); REAL ESTATE VALUATION AND CONDEMNATION (Practicing Law Inst. 1970). The right to compensation is not at issue in challenges to the merits of a taking. It is conceded, and only the particular amount is likely to be contested.

of governmental takings by practically restricting it to nothing but those two terms (only one of which even addresses substantive merits of the taking).[45] The implications of such automatic constraints on defendants' arguments are not trivial. In fact, the lingering suspicion is that condemnees would have been better off in modern courts if the Framers had failed totally to mention their situation, as with "privacy" rights.

Modern eminent domain is a political paradox that mirrors the twisting historical currents of substantive due process. On its face, governmental exercise of the condemnation power often awakens the reactionary rhetoric of the most stalwart conservative defenders of private property principles. But, in practice, it is often the power groups that call themselves "conservative" that are allied with the state in eminent domain actions. These sectors of society are only rarely the objects of unwanted condemnation actions. The stubborn individuals who resist condemnation, defending their private property rights, are often the ones stigmatized as liberal mavericks.[46]

In Professor Stewart's apt characterization,[47] the traditionally powerful forces of America's economic system—the nation's most effective governing structure from before the Revolution through this century—have now often joined forces with their erstwhile governmental regulators. When freeways, airports, and pork-barrel public work projects are built with the eminent domain power, the "conservative establishment" and government often constitute an indistinguishable bloc. The defendants in reported eminent domain cases often appear to be small individual landholders bucking the

---

[45] In view of such uncritical judicial deference, the argument can be made that, of the life/liberty/property triad, the right to property, particularly the right of the otherwise powerless individual to hold his dearest possession, is currently afforded the least protection. Given the firm textual basis for the right, this seems unjustified, unless one were to read the intent of the eminent domain clause not as a limitation of governmental power, but rather as a particular authorization for the exercise of power harnessed only by the compensation requirement. The latter interpretation would appear less likely for a clause placed firmly, indeed literally, in the middle of the Bill of Rights.

[46] The *Poletown* case is a vivid example of the somersault of pragmatism over ideology, with business co-opting government's condemnation power to its own ends, and Ralph Nader acting as the primary defender of private property. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1987). For the view that public purpose determinations are not to be made so liberally, see People v. Chicago Land Clearance Comm'n, 14 Ill. 2d 74, 84, 85, 150 N.E.2d 792, 798 (1958) (Klingbiel, J., dissenting) (arguing that it is not enough to show a general relationship to public health and welfare to satisfy public use); *see also* Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 44–49 (1981) (arguing for a stricter public benefit test).

[47] *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) [hereinafter Stewart, *Reformation*].

inevitable flow of progress; the major public works projects rarely seem to be planned for locations inhabited by wealth and power.[48] In the *Poletown* case,[49] for example, the largest American corporation accurately presumed that it could enlist the powers of government in its behalf to override the private property claims of lower-income landowners.[50] With a few notable exceptions, like campaigns against public land acquisition by private inholders groups,[51] eminent domain has achieved a comfortable familiarity and usefulness for its nominal ideological opponents on the Right.

Whatever the political sociology of eminent domain, the law of it deserves clarification. Recently, moreover, it appears that the United States Supreme Court may have opened the door to a more articulated form of substantive review, using rational-relationship, means-end review language as the basis for testing the validity of governmental condemnation.[52]

A. Current Eminent Domain

Although eminent domain case law presents many questions raising substantive review issues, current eminent domain wisdom typically does not articulate the distinctions noted here between authority, purpose, rational basis, and the individual burden. Arguments in each of the four diagnostic substantive categories, explored further below,[53] can be discerned in various condemnation cases,[54] but virtually never are the inquiries clearly stated or coherently analyzed. Accordingly, most attempts to obtain substantive merits review, as in the paradigm cases noted above, would almost surely suffer quick dismissal in many state courts despite their compelling merits and, at least until recently, in virtually all federal courts. The cases would receive cursory scrutiny focusing on public purpose, and then rapid approval of the takings without consideration of substantive rationality arguments.[55]

---

[48] A review of the digests gives the definite impression that most eminent domain takings involve relatively small and powerless individual landowners. This intuitive impression seems more well-founded given the fact that reported cases do not reflect those takings where defendants lack the money to defend, much less appeal.

[49] 410 Mich. 616, 304 N.W.2d 455 (1981).

[50] *See supra* notes 24, 34.

[51] The National Inholders Association appears to be the only substantial lobbying interest organization that makes opposition to eminent domain a major feature of its agenda.

[52] *See infra* notes 174, 178 and accompanying text.

[53] *See infra* note 191 and accompanying text.

[54] *See, e.g.*, Oklahoma v. Atkinson Co., 313 U.S. 508, 526 (1941).

[55] *Id.* at 527.

1. Public Use, Public Purpose—Missing the Point

The trouble with most active legal challenges of eminent domain is that they focus on the question of "public use." Consequently, as Alexander Bickel used to say, they not only miss the point, but they miss the wrong point.[56]

According to the fifth amendment, "private property [shall not] be taken for public use without just compensation."[57] Historically, it is quite clear that this phrase was thought of as a *further* individual protection, beyond due process.[58] In practice, however, the clause has served to narrow the scope of review to the public-use inquiry. Within that circumscribed inquiry, modern necessities have made that test even less meaningful by reading public use to mean that takings must merely serve a public *interest*.[59] Thus, the language intended to be a further protection has itself served to weaken basic due process protections of property in the condemnation setting.

Most lawyers who have actively tried to defend against eminent domain condemnations have targeted their efforts on some form of the public use issue, which, as we have seen, offers little chance for

Atkinson represents a missed opportunity for the Court to make a substantive rationality analysis. The United States government had begun to condemn more than 150,000 acres of state and private lands for the construction of the Denison Dam Reservoir. The government's purpose was improved flood control, navigation, and power generation. Oklahoma argued that its consequential revenue losses would be larger, and hinted that the benefits (at least as to navigation) would be "[i]nconsequential and unsubstantial." *Id.* at 515.

As in so many other eminent domain cases, however, the parties' arguments and the Court's decision ultimately came down to questions of public purpose. Justice Douglas, for a unanimous Court, wrote that the question of substantiality of flood control benefits "raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress not the courts . . . . a legislative judgment." *Id.* at 527. This sounds like a comment on substantive review. Douglas and the parties, however, were not addressing the means-end question, but rather whether the dam's flood control and navigation purposes served the basic interstate commerce function sufficiently to be deemed part of the rejected delegated federal power. *Id.* at 525–26. This interstate commerce question was far from a substantive means-end rationality review.

[56] Bickel used the jibe recurringly in classroom perorations in his Constitutional Law classes, Yale Law School, Fall Term 1965.

[57] U.S. CONST. amend. V.

[58] This is evidenced by the fact that today's Supreme Court frequently cites the 1897 case of Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897), as incorporating the compensation clause into the fourteenth amendment. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). The *Chicago* case marked the end of the twenty year reign of Davidson v. New Orleans, 96 U.S. 97 (1877), holding that due process does not require an independent restriction on the taking power, that is, the compensation requirement is not incorporated into the general notion of due process. While *Chicago*, 166 U.S. at 234–35, seemed to hold the contrary, the Supreme Court today seems geared to the notion that the compensation clause itself has been strictly incorporated into the fourteenth amendment due process clause, which leaves open the academic question whether due process necessarily contains the notion of compensation independent of any explicit provision relating thereto.

[59] *See* Meidinger, *supra* note 46.

meaningful review.[60] When private corporations receive condemned private property for subsequent redevelopment, for example, or when private corporations exercise delegated powers with or without designation as public utilities,[61] the defense argument is made and lost in terms of the government's alleged impropriety in using the eminent domain power for private rather than public use.

Beyond questions of the "privateness" of those who will use the land, the same rhetoric is also levelled at situations in which condemnation defendants wish to dispute the *appropriateness* and legitimacy of governmental takings purposes. When takings are sought for parkland, scenic easements, historical preservation, or other "aesthetic" reasons, they may be opposed as "improper public uses." By using this latter phrase, the defendants probably wish to emphasize the impropriety element: not that the uses are private, but rather that they are improper objects of public police power activity. The defendants can win if governmental purpose is improper for lack of delegated authority,[62] or because it violates some particular explicit or implicit constraint on governmental action.[63] But, absent such specific flaws, the public-use issue offers little support for the defense against eminent domain.

The public-use attack on eminent domain was predestined to lose. From before the Revolution, the public-use rubric has been extended to allow even private parties, exercising delegated powers, to condemn riparian lands of their neighbors in order to construct private mill dams and similar economic developments.[64] Through the nineteenth century, such grants of condemnation power expanded tremendously, and were upheld by the courts, as a function of traditional state support for the market economy.[65] Direct public use was not necessary; the more a court sought out "indirect" public use in order to justify such takings, the more it merely was looking for any

---

[60] *See supra* note 28 and accompanying text.

[61] Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694 (Ct. Ch. 1832); TVA v. Welch, 327 U.S. 546 (1946); Head v. Amoskeag Mfg., 113 U.S. 9 (1885); Berman v. Parker, 348 U.S. 26 (1954). In even some cases today, corporations are given the statutory power to condemn needed real property, without certification as public utilities. *See, e.g.*, MICH. STAT. ANN. § 13.145(101) (Callaghan 1987) (condemnation power for mining industry).

[62] *See* United States v. An Easement and Right-of-Way Over Two Tracts of Land, 246 F. Supp. 263 (W.D. Ky. 1965), *aff'd*, 375 F.2d 120 (6th Cir. 1967); United States v. Three Tracts of Land, 377 F. Supp. 631 (N.D. Ala. 1974); Rainbow Realty Co. v. TVA, 124 F. Supp. 436 (M.D. Tenn. 1954).

[63] Brown v. United States, 263 U.S. 78 (1923).

[64] *See, e.g.*, Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) (mill dam).

[65] For an excellent historical analysis, see Meidinger, *supra* note 46, at 43.

public interest or public benefit.[66] "[I]f the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public."[67] Those cases where courts did strike down particular takings as "private uses" seem to reflect judicial disagreement with the social policies being advanced, or disagreements that such takings would provide real public benefits.[68] On its own terms, the public-use limitation therefore does not seem to have much doctrinal solidity; it does serve, however, as a stalking horse representing other questions of public purpose. In modern practice, moreover, "the main question is not whether a taking is for a public purpose, but whether it is for a *legitimate* purpose."[69]

But even if the challenges of the "publicness" of use and purpose are reinterpreted as reviews of the legitimacy of an action's public purpose, they still miss the point. It should be noted that the real-life motivations of participants in a condemnation challenge usually are focused on quite different issues from the "privateness" of subsequent uses or the abstract legitimacy of a particular public purpose. What they are concerned with are the *merits* of the condemnation action and its effect on themselves. In the case of condemnees, they may be motivated by a realistic estimation of how much they will lose in the transaction. Just compensation, even in the hands of a sympathetic jury, may fail to compensate condemned landowners for a wide range of felt losses—sentimental value, some forms of ongoing business value, the costs of relocation in financial and emotional terms—these are some of the areas of private loss that go uncompensated in eminent domain.[70]

Further, many challenges to eminent domain today are supported not only by affected landowners, but also by others whose land is not being condemned who oppose particular governmental projects

---

[66] *Id.* at 43.

[67] *Id.* at 49.

[68] As a negative example, only one federal case striking down a state condemnation action on public-use grounds appears to exist, and it is actually a case defending a corporate interest in prior condemned lands. *See id.* at 30–31.

[69] *Id.* at 43.

[70] The number of condemnation cases that go to trial on the issue of compensation would seem to reflect an empirical or intuitive conviction on the part of defense attorneys that juries are likely to grant more generous assessments of just compensation than are contained in the settlement offers based on land appraisals made outside of court proceedings. As to damages not compensated, see *supra* note 7. *Cf.* Meidinger, *supra* note 46, at 43 n.161 (citing Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554 (1972) (implying that eminent domain condemnees are generally pleased with their lot)).

on various grounds and wish to use the eminent domain forum to raise the issues. When the quaintly named Courtesy Sandwich Shop decided to fight land condemnation for construction of the giant World Trade Center, for example, it was supported by commercial property owners who were *not* being condemned but who felt strongly that there was no need for new office space which would compete with their holdings.[71]

Both classes of opponents to eminent domain actions—condemnees and interested non-condemnees alike—thus would be delighted to be able to raise arguments on the merits beyond public use and purpose. Pragmatically, any further argument would bolster their positions. Moreover, many eminent domain projects are susceptible to arguments about the rationality of governmental decisions. Although defendants' arguments about rationality can often be discerned in the media coverage of such controversies,[72] and sometimes even in the shadows of eminent domain opinions,[73] in the open judicial forum they collapse back into arguments and holdings on public use and purpose.

Berman v. Parker[74] provides a superb example of that double missing of points. In that classic case, the District of Columbia's condemnation power was used to take a large part of southwest Washington's rundown land for urban redevelopment. Defendant Berman, who owned a medium-sized department store in the midst of the tract, was a condemnee who resisted all the way to the Supreme Court. His property was not blighted; it would nevertheless be taken by the government, levelled, and turned over to a private redevelopment corporation to be used for privately owned housing units and commercial uses.[75]

---

[71] Courtesy Sandwich Shop v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402, (1962), *appeal dismissed*, 375 U.S. 78 (1963). Even though other parties may be financing the litigation, it proceeds, of course, under the name of the condemnees.

[72] *See, e.g., Big Utility and Little Town are Battling A Dam Proposal in Vermont*, N.Y. Times, Oct. 5, 1980, at 56, col. 3; *State Seizes Building Site Next to Carey's L.I. Home*, N.Y. Times, Nov. 10, 1980, at 11, col. 1; *see also* N.Y. Times, Nov. 11, 1980, at 11, col. 1; N.Y. Times, Nov. 12, 1980, at 11, col. 1.

[73] In *Courtesy Sandwich Shop*, Justice Van Voorhis noted in dissent: "Respondent's brief points to the quantity of space occupied in New York City for foreign trade, and the impossibility of condensing it into [an] area of 13 blocks, and questions by what principle private firms are to be selected for location there . . . ." 12 N.Y.2d at 394, 190 N.E.2d at 408 (Van Voorhis, J., dissenting).

[74] 348 U.S. 26 (1954).

[75] *Berman* was a fifth amendment case because it arose in the District of Columbia. Federal courts extended public use reviews to state condemnations, under the fourteenth amendment, after Missouri v. Nebraska, 164 U.S. 403 (1896).

As *Berman* proceeded through the courts, its dominant arguments centered around public use, and that is how it is usually remembered. Stating what had by then become obvious, the Court remarked:

> The role of the judiciary in determining whether [the condemnation power] is being exercised for a public purpose is an extremely narrow one . . . . Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear . . . .[76]

On those terms, it was hardly surprising that the Court ultimately held the taking valid as a matter of fifth amendment due process.[77]

The purported prohibition against private uses was thus a phantom.[78] In a society so characterized by the admixture of private and public power, if a project is directed at accomplishing a public purpose or public benefit that lies within the government's scope of authority, then eminent domain can be utilized regardless of whether private persons profit from or control the subsequent land use. If the legislature declared that urban renewal was of direct or indirect public benefit in assuring housing for its citizens (clearly a proper general welfare purpose within the government's powers), that would be enough.[79] The same could be said beyond housing, to the ends of general economic development.[80] The scope of permissible governmental purposes is broad, and, given the presumption of governmental validity, the major obstacle to upholding such takings is only their novelty of subject matter.[81]

---

[76] 348 U.S. at 33.

[77] *See supra* note 28 and accompanying text.

[78] "The role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one . . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power . . . . Yet they merely illustrate the scope of the power and do not delimit it." *Berman*, 348 U.S. at 32. Some scholars had thought it was alive until then. *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

[79] "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area . . . [And] the means of executing the project [is] for Congress and Congress alone to determine . . . once the public purpose has been established." *Berman*, 348 U.S. at 33.

[80] The *Berman* renewal project resulted in a higher level of commercial and office development and some housing, though it appears that few of the prior low income residents of the district would have been able to remain in the far more expensive units that replaced the old. The general economic development purposes, however, were clearly precedented by the mill dam and the TVA cases. *See* EDF v. TVA, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974); Head v. Amoskeag Mfg., 113 U.S. 9 (1885).

[81] The difficulty that Oakland, California would have in condemning its wanderlust profes-

But what did Mr. Berman really want to tell the courts? In part, surely he wanted to argue that he considered this a *stupid* taking—it did not make sense. It did undoubtedly irk him that someone else might reap the future profits of his parcel. A major part of his common-sense argument was, however, that, because his property was not blighted, it did not logically serve the public purpose to redevelop it, especially in light of the costs the public would have to pay to buy it, tear it down, and rebuild it. Analytically, this argument does not deny that such redevelopment might ultimately serve public ends. Rather, it asserts that it was, in one sense of the word,[82] "unnecessary": given the costs to the public and Mr. Berman, it was not rational to choose to condemn and redevelop his unblighted property rather than just leave it in *status quo*. If it ain't broke, don't fix it.

This contention, though it might not have been a winning argument,[83] surely got to the guts of the dispute and deserved thought. The justices, however, never confronted the question of specific rationality, that is, whether the condemnation of this particular parcel served the public redevelopment purpose.[84] They might well have been able to so find: the needs of area-wide development probably explained the *Berman* taking. But the decision dealt with means-end rationality in relentlessly general terms, and the argument as to specific rationality ultimately was finessed away via the presumption of validity.[85]

The same failure to give due recognition to the central merits of a project can be seen in other "public purpose" cases. In *Courtesy Sandwich Shop*,[86] the rhetoric of proper public use, purpose, and powers dominated the court's opinions and scholarly commentary:

---

sional sports teams would be more likely to lie in questions about municipal *authority*, in light of the novelty of the issue, rather than in public use or rationality.

[82] *See infra* note 105.

[83] Berman would probably have been unable to show a sufficient lack of rational basis, given the presumption of validity and the real-life practical demands inherent in redeveloping a large sector of rundown urban terrain.

[84]

> Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But . . . it is the need of the area as a whole which Congress and its agencies are evaluating. . . . The argument pressed upon us is . . . a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. . . . But . . . community redevelopment programs need not . . . be on a piecemeal basis—lot by lot, building by building.

Berman, 348 U.S. at 35.

[85] *Id.* at 32–33, 35.

[86] 12 N.Y.2d 379, 190 N.E.2d 402 (1963).

could the New York Port Authority use eminent domain to build an office building to be used by private corporations from all over the world? The condemnees wanted to make a number of substantive arguments on the merits beyond public use, but were largely bypassed by the court. The Authority had been delegated powers for the purpose of encouraging efficient port activity and commerce,[87] which all parties seem to have accepted as a proper purpose. Given this specific delegation, the condemnees tried to argue that the construction of huge office buildings not directly related to port activity did not *serve* the proper port purposes.

This claim had two aspects: first, office construction *per se* was too far removed from direct port purposes to be permitted as a delegated purpose; second, it would not rationally achieve that purpose—a rational-basis argument. The court defined its way out of the first argument by holding that an indirect linkage to the proper purpose was enough,[88] and avoided the second by merely presuming that linkage to exist. According to the court, "[the] improvement of the Port of New York by facilitating the flow of commerce and centralizing all activity incident thereto [is] a public purpose supporting the condemnation of property *for any activity functionally related to that purpose.*"[89] This statement is not addressed primarily to the purpose, however, but to the "functional relationship" of means to ends, a relationship that was presumed rather than examined.

Yet the reality of *Courtesy Sandwich Shop* is that opponents to the World Trade Center thought they could show that the project would create an office glut.[90] They argued that, even if office space served port purposes indirectly, no rational planner would build so much new space given the amount of existing office space and the private and public costs of building the new. The new space, in other words, was "not necessary."[91] But, whatever the strength of these substantive arguments that constituted the real merits of the controversy, the court never gave the defendants a chance to present

---

[87] *Id.* at 387, 190 N.E.2d at 403.

[88] *Id.* at 390–91, 190 N.E.2d at 406.

[89] *Id.* at 389, 190 N.E.2d at 405 (emphasis added).

[90] *See* O'Donnell, *Skyscraper Controversy*, Wall St. J., March 5, 1964, at 12, cols. 2–3.

[91] Implicit in this latter argument is the premise that there was no particular reason to have the office space clustered at one site; the relevant office space market was city-wide. *See Courtesy Sandwich*, 12 N.Y.2d at 194–95, 190 N.E.2d at 408–09 (Van Voorhis, J., dissenting). The Port Authority did not try to make the counter-argument, instead relying successfully on judicial reluctance to review the decision substantively.

relevant evidence on them; all arguments had to be played through the superficial discussion of public purpose.

In these cases,[92] the challenges do not appear to have been motivated by aversion to the privateness of subsequent usage, or to the fact that it was the government qua government that was taking the action. Those arguments just provided the issues that courts would at least listen to, the issues of public use and proper purpose. So the judicial litigation of these major eminent domain cases has continued on, somewhat beside the point.

Courts do, of course, require that eminent domain actions be grounded upon a proper public purpose. When a government tries to condemn private property without any such defined purpose, it will be enjoined. In *Cincinnati v. Vester*,[93] a group of urban landowners objected to a condemnation action in which the city declined to define the purpose as street widening (which would have been valid but which the city did not propose to do), nor would the city define any possible rationale for excess condemnation beyond the basic parcel required to achieve a project goal.[94] The Supreme Court insisted that a valid purpose be defined contemporaneously with the taking:

> To define is to limit, and that which is left unlimited, and is to be determined only by such future action as the City may hereafter decide upon, is not defined. The City's contention is so broad that it defeats itself. It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation.[95]

The *Vester* Court did not strike down excess condemnation or governmental recoupment of land inflation values as improper; it merely affirmed the necessity of an articulated, valid takings purpose, and the vulnerability of condemnations like *Vester*'s that lacked such a declared purpose.

Despite this preoccupation with the public-purpose inquiry, or perhaps because of it, judicial discussions often reveal glimmers of substantive rationality review behind the purpose language. Like the ambiguity lurking behind the word "arbitrary," the lack of judicial clarity in defining the public-purpose inquiry invited indiscriminate inclusiveness in its application.

---

[92] Other cases follow this pattern. *See, e.g.*, Brown v. United States, 263 U.S. 78 (1923); TVA v. Welch, 327 U.S. 546 (1946).

[93] 281 U.S. 439 (1930).

[94] *Id.* at 443.

[95] *Id.* at 448.

In the course of the *Vester* Court's opinion striking down the Cincinnati taking, for example, it is clear that the gravamen of the condemnees' defense was not merely that the city had failed to declare which particular delegated purpose was being addressed, but also that the additional taking did not *serve* any of the potentially relevant purposes.[96] The Court seemed to incorporate that substantive inquiry into its discussion of purposes.[97] Nevertheless, it ultimately restricted the basis of its holding nullifying the taking to the simple absence of a declared purpose.[98] *Vester* thus illustrates how the public-purpose inquiry can swallow up straightforward consideration of the substantive issue of rational means and nexus. It also demonstrates how the purpose inquiry can be confused with, or subsume, the authority inquiry as well.[99] In either case, courts are able to avoid the difficulties of discussing difficult analytical questions by resolutely keeping their holdings pinned to the misplaced point.

2. Getting to the Point in State Condemnation Cases

State eminent domain cases offer significantly more variety than federal cases, and in many of them there can be discerned a willingness to review the rationality of the condemnation choices of agencies or legislatures. To be sure, in a large number of cases state decisions echo the federal courts' severe limitation of judicial review to questions of delegated authority and public use, both questions to be interpreted deferentially in favor of project validity.[100] Some even hint that the latter issue is unreviewable.[101] But, in many other cases, state courts undertake substantive review of condemnation takings beyond questions of public use and purpose, including express inquiries into bad faith, arbitrariness, and "necessity."[102]

The state decisions reviewing condemnations on rationality merits fall into both categories defined in the paradigms presented here, the factual implausibility, means-end model and the rational alter-

---

[96] *See id.* at 447.

[97] *See id.*

[98] *Id.* at 448.

[99] *See supra* note 92 and accompanying text.

[100] *See, e.g.*, Coastal Indus. Water Auth. v. Celanese Corp., 592 S.W.2d 597 (Tex. 1979) (legislature's determination of public purpose is conclusive absent arbitrary or unjust action).

[101] *See, e.g.*, City of Pipestone v. Halbersma, 294 N.W.2d 271 (Minn. 1980); Monarch Chemical Works, Inc. v. City of Omaha, 203 Neb. 33, 277 N.W.2d 423 (1979).

[102] *In re* Heidelberg for Footpath, Alleyway and Bridge Purposes, 53 Pa. Commw. 321, 428 A.2d 282 (1981); Brodeur v. City of Claremont, 121 N.H. 209, 427 A.2d 509 (1981); City of Atlanta v. First National Bank of Atlanta, 246 Ga. 424, 271 S.E.2d 821 (1980).

natives model. In some of these state eminent domain cases, the defendant condemnees argued that the particular condemnation actions would not serve the purported project purposes—a substantive, factual means-end claim.[103] Other cases have raised the second question of alternatives, reviewing whether, in light of the injury to protesting parties, less injurious governmental choices were available and preferable.[104]

Many of the state cases in which eminent domain decisions are given critical substantive review focus on the concept of "necessity," a frequently encountered element of state takings reviews that is exceedingly rare in federal cases.[105] With or without specific statutory or constitutional limitations, a number of state courts have felt at liberty to test and strike down a wide variety of condemnation attempts as "unnecessary." They have refused, for example, to allow the taking of a particular site for warehousing because it was deemed unsuitable, they have forced re-alignment of a particular highway condemnation, and they have restricted certain condemnations to less-than-fee-simple takings.[106]

Analytically, the word "necessity" is not comprised of a single concept. It may raise questions of comparative need for a particular parcel in light of alternatives available;[107] or doubt whether the property is sufficiently needed to accomplish the ends in light of the particular private burdens, a comparative weighing remarkably similar to that in some regulatory takings cases;[108] or questions of

---

[103] *See, e.g., Pipestone*, 294 N.W.2d at 274 (holding that evidence of means-end reasonableness would establish necessity).

[104] Madison County v. Elford, 203 Mont. 293, 661 P.2d 1266 (1983) (failure to evaluate alternative highway route, in light of private injury, renders condemnation improper); State v. Superior Court, 128 Wash. 79, 222 P. 208 (1924) (alternate zone would be less harmful to public and private interests); State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982); Schara v. Anaconda Co., 187 Mont. 377, 386–87, 610 P.2d 132, 137 (1980) (private mining company's delegated use of condemnation power upheld after consideration of condemnee's injuries and alternative), *cert. denied*, 449 U.S. 920 (1981); *see also* cases cited at *infra* notes 106, 114.

[105] *See, e.g.*, Knappen v. Division of Admin., 352 So. 2d 885 (Fla. App. 1977); King County v. Burhen, 29 Wash. App. 497, 628 P.2d 1341 (1981); Falkner v. Northern States Power Co., 75 Wis. 2d 116, 248 N.W.2d 885 (Wis. Ct. App. 1977).

[106] *See, e.g.*, Sapp v. Hillsborough County, 262 So. 2d 256, 257 (Fla. 1972) (determining from aerial maps that road "could and properly should be constructed through [an] unoccupied area thereby saving . . . [houses] as well as . . . money"); State v. Superior Court, 128 Wash. 79, 222 P. 208 (1924) (voiding as arbitrary the taking of publicly beneficial warehouse for highway); People v. Y.W.C.A. of Springfield, 86 Ill. 2d 219, 427 N.E.2d 70 (1981) (taking was "grossly excessive" in light of need); *see also* cases cited *infra* note 114 (reducing attempted takings of fee simple to lesser interests).

[107] Schara v. Anaconda Co., 187 Mont. 377, 610 P.2d 132 (1980), *cert. denied*, 449 U.S. 920 (1981).

[108] *See, e.g.*, Topham's Petition, 58 Pa. D. & C. 649 (1946) (acquisition of gravel through

whether the governmental project is not actually served by the particular taking.[109] In some state cases, furthermore, there is also a hint that the court regards the governmental project as itself unnecessary.[110] In each example, such holdings are interesting because they, except perhaps the last, require the courts to examine the nexus between the substantive qualities of the condemnation and legislative purposes.[111]

In fact, the state courts' substantive inquiries in many cases seem to take on the most sensitive kind of judicial review of governmental decisions, even questioning whether legislative purposes could have been better accomplished by different governmental means. Thus, when the potential inquiry to the property owner is severe, the court in effect may undertake a "less-drastic-means" analysis as a matter of due process.[112] If a road could be re-aligned to minimize a private property owner's harm without compromising safety and efficiency, it might be so ordered.[113] If the taking of less-than-fee-simple easements would serve governmental purposes equally well with less injury to the condemnee, that too may be ordered.[114]

Such judicial reviews obviously invade the precinct of official discretionary judgment. They do not necessarily ignore, however, the principles of judicial deference to governmental decisionmaking. As one court explained, "the scope of review is narrow," but deference is not absolute: "[the legislative determination] is not completely

---

eminent domain proceedings is only justified if the gravel cannot be obtained by contract at reasonable prices); Mayo v. Windels, 255 A.D. 22, 5 N.Y.S.2d 690 (N.Y. App. 1938) (taking of property beyond that required for particular purpose is unconstitutional); Stearns v. City of Barre, 73 Vt. 281, 50 A. 1086 (1901); Lawton v. Steele, 152 U.S. 133 (1894) (discussed *infra* text accompanying note 247).

[109] *See, e.g.*, City of Pipestone v. Halbersma, 294 N.W.2d 271 (Minn. 1980); Falkner v. Northern States Power Co., 75 Wis. 2d 116, 248 N.W.2d 885 (Wis. Ct. App. 1977); Highland Realty Co. v. Indianapolis Airport Auth., 182 Ind. App. 439, 395 N.E.2d 1259 (1979).

[110] *See, e.g.*, Peavy-Wilson Lumber Co. v. County of Brevard, 159 Fla. 311, 31 So. 2d 483 (1947) (public necessity justifying a taking by eminent domain did not exist where county only condemned land for public hunting and fishing purposes); Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977); People v. Y.W.C.A. of Springfield, 86 Ill. 2d 219, 427 N.E.2d 70 (1981).

[111] *See supra* note 103 and accompanying text.

[112] *See supra* note 104 and accompanying text.

[113] State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982); Schara v. Anaconda, 187 Mont. 377, 610 P.2d 132 (1980), *cert. denied*, 449 U.S. 920 (1981): "[C]hoice of location . . . is to be overturned only . . . [if there is] clear and convincing proof that the decision was excessive or arbitrary, and an abuse of discretion will be found if the condemnor fails to study alternatives." *Id.* at 137, *see also* cases cited *supra* note 106.

[114] *See* Seadade Indus. v. Florida Power & Light Co., 232 So. 2d 46 (Fla. App. 1970); Silver Bow County v. Hafer, 166 Mont. 330, 532 P.2d 691 (1975); State v. Jeanerette Lumber & Shingle Co., 350 So. 2d 847 (La. 1977); Hallock v. State, 32 N.Y.2d 599, 604–05, 300 N.E.2d 430, 432, 347 N.Y.2d 60, 63–64 (1973).

immune from judicial reviews. There is a limit beyond which the legislature (or its delegate) cannot go . . . ."[115] Where condemnees could marshal sufficient evidence to outweigh the presumption of governmental validity, the state courts have often been willing to listen, and the test they apply for necessity amounts to a rational-person standard remarkably similar to the *Universal Camera* substantial evidence rubric: courts will strike down a taking decision if they believe that the decisionmaking officials could not reasonably support the taking on the facts and standards before them.[116]

The remarkable thing about the state court opinions undertaking substantive condemnation review is not that this body of cases exists, in contrast to the relative lack of such cases in federal court.[117] That disparity may be explained by the fact that some of the subject states have some specific constitutional or statutory invitation for such review,[118] or may also be explained by the fact that state court judges are more leery of state bureaucrats than federal courts are of the federal bureaucracy.[119] What is more notable, however, is that the practice of substantive review has apparently not caused major problems between the tripartite divisions of state government. Some state courts have entered into substantive review of the merits of legislative and executive condemnation decisions, and their state governments have survived. Those courts have apparently not "usurped" the decisionmaking function; indeed, they generally defer to governmental choices, but occasionally reverse, in the same way that federal courts handle administrative law cases. Where state trial-level courts act excessively, appellate courts rein them in.[120]

---

[115] *See, e.g.*, Knappen v. Division of Admin., 352 So. 2d 885, 891 (Fla. App. 1977) (noting that "[a]lthough a 'broad discretion' is vested in the condemnor, . . . the evidence adduced . . . was insufficient to withstand the challenge") (citation omitted).

[116] *See id.*

[117] "It is not for the [federal] courts to review the necessity of a taking." United States v. 416.8 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975). *Accord* Berman v. Parker, 348 U.S. 26, 32–33 (1954); United States v. Carmack, 329 U.S. 230, 247 (1946); United States v. Certain Real Estate, Nashville, Tenn., 217 F.2d 920, 924 (6th Cir. 1954); United States v. 80.5 Acres in Shasta County, Cal., 448 F.2d 980, 983 (9th Cir. 1971); United States v. 2606.84 Acres in Tarrant County, Texas, 432 F.2d 1286, 1289 (5th Cir. 1970). *But see* Washington Metro. Area Transit Auth. v. One Parcel of Land in Square 164, C.A. No. 75-0056 (D.D.C. Aug. 14, 1975) (LEXIS, Genfed library, Dist. file); United States v. Certain Parcels of Land in Philadelphia, 215 F.2d 140 (3d Cir. 1954).

[118] *See, e.g.*, State Transp. Bd. v. May, 137 Vt. 320, 322–24, 403 A.2d 267, 269 (1979).

[119] *Knappen*, 352 So. 2d at 891. "The reason that Florida courts have consistently held that a judicial inquiry is permissible into the necessity of taking stems from their awareness of the 'tunnel vision' that so often plagues a bureaucracy which deems itself immune from judicial review." *Id.*

[120] *See, e.g.*, City of Atlanta v. First Nat'l Bank of Atlanta, 154 Ga. App. 658, 269 S.E.2d 878, *rev'd*, 246 Ga. 424, 271 S.E.2d 821 (1980).

The experience in the states, then, seems to be that substantive review of eminent domain decisions is not an impossibly difficult undertaking, nor a slippery slope to judicial usurpation of separated powers, even in the more sensitive realm of comparative-alternatives rationality analysis.

3. Of Necessity

The state cases not only demonstrate the viability of legal systems in which substantive eminent domain review occurs, but also that the concept of "necessity" deserves further analysis. Semantically, the term "necessity" conjures up images of subjective political decisionmaking—terrain that judges well wish to avoid. The determination of "needs" implies a weighing of varying public priorities and factual assessments that is best left to legislative judgment.

Necessity, though it is a fairly common form of substantive review on the merits in state eminent domain cases,[121] is rejected as a basis for substantive review in most federal condemnation cases. Federal courts, unlike state courts, consistently declare their refusal to review questions of "necessity" in condemnation cases:

> The necessity for appropriating private property for public use is not a judicial question.[122] [T]he necessity and expediency of the taking are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.[123] That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion.[124]

The treatises repeat the federal prohibition[125] while recognizing necessity review in the states, a particularly paradoxical situation because both lines of eminent domain jurisprudence derive from the same roots.[126] "Necessity" may have several different meanings, however, which, upon further analysis, may show that the seemingly contradictory state and federal positions do not lie so far apart.

To examine this spectrum of necessity arguments, consider a variety of possibilities arising from a municipal airport project involving eminent domain. One necessity argument that a condemnee could

---

[121] *See supra* note 105.

[122] Rindge Co. v. Los Angeles, 262 U.S. 700, 709 (1922).

[123] Bragg v. Weaver, 251 U.S. 57, 58 (1919).

[124] Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923).

[125] *See* 1A NICHOLS, *supra* note 7, § 4.11.

[126] 1 NICHOLS, *supra* note 7, § 1.41; 1A NICHOLS, *supra* note 7, § 4.9.

try to make is that the entire project was "unnecessary"; in other words, an overall drastic attack on the basic governmental decision. This version of a necessity inquiry is not likely to attract judicial review in either state or federal court systems. The general decision to proceed with an airport so clearly involves such a complex balancing of so many factual considerations and subjective policies of planning, growth, transport, and subsidies that it can scarcely be made fit for judicial parsing. As an ultimate overall, generic conclusion, it is truly a "legislative question."

Another type of necessity inquiry would concede the need for an airport, but challenge the municipality's choice of the particular site because other equally attractive sites were available. This version might be called a "preference necessity" argument: the chosen site is alleged to be "unnecessary" in the sense that the city could just as easily have gone elsewhere. This necessity argument is also likely to be a loser in both state and federal courts, not because of its legislative complexity but because of the closeness of the question. At times, it is the job of legislatures and the political process to draw indefensible lines, to make close choices between reasonable options that have no clear distinctions on the merits. In order to review such close siting choices on the merits, courts would have to probe into such intricate detail that reviews would resemble trials *de novo*. When a governmental eminent domain choice is made between such reasonably close options, it is again a legislative question.

Both of these examples illustrate exercises of legislative "wisdom" which courts understandably refrain from scrutinizing.[127] But what of a further kind of necessity argument, a claim that a parcel chosen for condemnation is not necessary in the sense that it does not serve any relevant purpose? Suppose a condemnee's parcel is located two miles from the nearest airport runway or terminal. The defendant may then argue a lack of "means-end necessity," not attacking the idea of an airport itself, nor a municipal preference between close choices, but alleging a basic absence of relevant airport-connected use for the condemned parcel.

This latter form of necessity defense would seem to make basic common sense, and is far more fitting and ripe for judicial review. The question is not subtle. It is not subjective. It is not complex. All parties would have to agree that the avowed purpose of the condemnation is for airport development; the only question would

[127] The "wisdom" inquiry parallels the "necessity" question. When a court avoids reviewing "wisdom," it probably indicates these first two types of subjectivity.

be whether this particular condemnation serves that purpose. Having gone forward with proof of a lack of such factual support in the fact of their parcel's two-mile geographical separation from the airport, the defendants should be able to shift the burden to the government to justify its choice. The airport authority then might show that the parcel is needed for a radio antenna, a weather station, a fuel storage dump, a radar scanner, a noise buffer zone, or some other airport-relevant use for that parcel. But if there is no such articulable use that serves the airport purpose, what peril lies in having the court nullify that particular taking?

In fact, despite their protestations, federal courts as well as state courts do undertake this third, means-end version of necessity review. As a District of Columbia court said in reviewing the transit authority's choice of a subway elevator site:

> It is well settled that the "necessity" of the taking is not a cognizable defense and is beyond the scope of judicial review [citing the standard cases] . . . . However, where the defendant can demonstrate . . . "absolute lack of necessity," judicial intervention is proper.[128]

What was the difference in meaning between mere unreviewable lack of necessity and "absolute" lack of necessity? It would appear that the first phrase referred to close-call preference necessity, and the latter to a basic means-end necessity. In reviewing the "absolute lack of necessity," the District of Columbia court then moved quite matter-of-factly into a variety of rational-basis inquiries.[129]

This pragmatic interpretation of necessity review is buttressed by the constitutional connotations attached to it in the treatises.[130] The state courts reflect the same distinction in declining necessity review for governmental choices between reasonably close alternatives, but reviewing means-end necessity situations.[131]

A fourth form of necessity review is also found in the state cases: a least-drastic-means necessity test. What if, for example, the airport authority has decided to condemn the site of an ongoing business, to be razed for an airport parking lot, when another equally useful, undeveloped tract lies close at hand? This situation is not a

---

[128] Washington Metro. Area Transit Auth. v. One Parcel of Land in Square 164, C.A. No. 75-0056 (D.D.C. Aug. 14, 1975) (LEXIS, Genfed library Dist. file) (citing standard cases and NICHOLS, *supra* note 7).

[129] The court considered the location of elevators as serving the access of handicapped persons, as well as alternative designs. *Id.*

[130] *See, e.g.*, 1A NICHOLS, *supra* note 7, § 4.11[1].

[131] *See supra* notes 104–08.

mere preference necessity nor a means-end necessity question.[132] Instead, the condemnees assert that, in light of the drastic effects on their business property, and the availability of cheap, nondisruptive takings parcels nearby, a rational governmental official would not choose to condemn their site. The government may rebut by showing reasons for doing so. If it cannot do so, numerous state courts have not hesitated to prohibit the more drastic taking.[133] No *a priori* reason is evident why federal courts could not do likewise.

The least-drastic-means test in administrative law appears to be a creation of the federal courts, deriving in the regulatory setting from the *Lawton v. Steele* Court's declaration that governmental impositions upon private rights would be held to judicial scrutiny as to whether "the means are reasonably necessary for the accomplishment of the [public] purpose and not unduly oppressive upon individuals."[134] Federal condemnation courts have been most reluctant to take on this fourth form of necessity test. Analytically, however, it represents a very different question from the overall project-necessity challenge and the close-call preference inquiry. In fact, it does not seem semantically appropriate to call it a necessity question at all. Instead, it resembles a kind of comparative rational-basis inquiry that can be posed in classic *Universal Camera Corp. v. NLRB*[135] terms, fit and ready for deferential but substantive review: given the injury to the affected individual, and the array of less drastic available alternatives, could a rational official decisionmaker have so decided?

In sum, some forms of "necessity" inquiry are clearly not appropriate for judicial review because they raise legislative questions. Others, however, can and do receive court scrutiny because they raise important and justiciable questions about private property rights. Yet, because they can be defined as "necessity" questions, some courts will ignore these latter cases as well. The term "necessity" may not be generally useful; the review process it connotes in some cases, however, may be. By asking instead what particular form of inquiry is being made, courts can substantially clarify what is and what is not appropriate for judicial review. As so often in the

---

[132] That is, the condemnation will ultimately serve the proper purpose, but at unreasonable cost to all.

[133] *See supra* note 104. This analytically includes cases where courts have compelled the zero alternative, that is, the alternative of no taking at all where private loss appeared greater than any governmental need.

[134] Lawton v. Steele, 152 U.S. 133, 137 (1894). *See infra* notes 247–49.

[135] See text accompanying *infra* notes 223–33.

murky swamp of eminent domain doctrine, judges must remember to practice semantic hygiene in order to accomplish their mission.

B. Possibilities for the Next Generation of Federal Eminent Domain Cases

The anomaly of eminent domain is that important substantive issues of private rights like those raised in the condemnation paradigms above[136] are virtually insulated from judicial review. Condemnation takings, with their drastic effects on private interests, are even less scrutinized than governmental actions generally. Indeed, the judicial insulation of eminent domain only has equivalents in the far more portentous fields of national security, international relations, and political questions.[137] Especially where so many condemnations occur in the much less august settings of public utilities takings, or at the lower levels of municipal government, it would be surprising if the wall of deference surrounding eminent domain in federal courts were not developing some judicial review cracks.

Given the anomalous current degree of insulation, what potential exists for more meaningful arbitrary and capricious substantive review in the future? As demonstrated subsequently in Section IV, such an extension of review can, in part, be based on a general recognition that substantive due process inquiry is not anathema; it is an established component of the courts' constitutional jurisdiction. Substantive due process occurs in present-day reviews of public purposes, authority, and bad faith, as well as in occasional avowed arbitrariness reviews. There are, moreover, compelling arguments and extensive scholarly and case law foundations for rationality review in general.

Rationality review appears to be practicable. As recent developments in the equal protection cases[138] and longstanding techniques in administrative law adjudication have demonstrated, rational basis

---

[136] *See supra* notes 24–41 and accompanying text.

[137] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979), *vacating and remanding mem.* 617 F.2d 697 (D.C. Cir. 1979) (en banc per curiam); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); *cf.* de Arellano v. Weinberger, 568 F. Supp. 1236 (D.D.C. 1983) (confiscation of American-owned Honduran lands by the United States military is a political question), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (not a political question).

[138] *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 78–79 (1972) (analyzing rational basis and striking down a double bond requirement for tenants challenging evictions); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979).

review can walk the tightrope—reviewing, without taking over the legislative and administrative functions, and deferring to a measured degree without abdicating the crucial structural role of judicial overviews. Within the field of eminent domain law, as well, there are seeds of change that may increasingly produce substantive reviews of governmental condemnation decisions.

1. Seeds of Change: The Historical Argument

If eminent domain in the federal courts has been regarded as a citadel of governmental immunity from judicial review, there are nevertheless some weaknesses in its defenses. In the Constitution, eminent domain was not reserved as a prerogative power of the states. Quite to the contrary, its only appearance in the Constitution was in the middle of the Bill of Rights, which would seem to emphasize its links with the affirmative due process protections that regularly receive active judicial protection. Moreover, eminent domain does not appear to have held any particularly important place in the minds or deliberations of the Framers that would imply a power insulated from judicial review. Exercises of eminent domain in the nineteenth century appear to have been occasionally subjected to forms of substantive review beyond public use questions.[139]

Traditional statements about the eminent domain power over the years have frequently asserted, at least in theory, the substantive limitations of bad faith, unreasonableness, and necessity.[140] The undeniable practice of abject deference may best be explained as pragmatic judicial accommodation to the needs of a rapidly developing society in which government played a critical facilitating role. Given the serious constitutional interests thereby eroded, however, and the historical background, it may have been more appropriate to ask what constitutional basis exists for insulating questions of condemnation takings from substantive review.

2. Developments in the Federal Courts

The federal courts that hold to such a strict line on eminent domain review came late to the condemnation game. For years, the federal government only used the seconded power of the states to obtain

---

[139] *See* Ligare v. City of Chicago, 139 Ill. 46, 28 N.E. 934 (1891); New Central Coal Co. v. Georges Creek Coal & Iron Co., 37 Md. 537 (1973); Shick v. Pennsylvania R.R., 1 Pearson 262 (Pa. C.P. Dauphin 1867).

[140] *See* 1A NICHOLS, *supra* note 7, § 4.9, at 4–52.

needed land, and it was not until the 1875 case of *Kohl v. United States* that the Supreme Court established the validity of federal eminent domain power.[141] When they conflicted, federal jurisdiction overrode state jurisdiction,[142] and, as we have seen, the federal holdings gave much less free rein to the courts than their state counterparts.[143]

Nevertheless, there were indications over the years that federal courts too, at least theoretically, can undertake review of arbitrariness and bad faith.[144] In a variety of appellate cases, federal courts applied those tests as proper components of judicial review. The Supreme Court, however, several times declared the opposite, repeating that review of public purpose exhausted the judicial function.[145]

If those opinions attempted to close the door on substantive review, however, it was somewhat reopened in the case of *United States v. Carmack*[146] and has remained so since then. A series of lower federal courts and the Burger Court have subsequently appeared to be open to *Carmack*'s invitation. In the notable *Carmack* case, involving the condemnation of several acres of town land in Cape Girardeau, Missouri for a new post office, the Court raised and reserved the question whether the federal site choice could have been attacked as arbitrary and capricious.[147] The site chosen by the Postmaster General was not the recommended choice of the agency's site inspector (it was the runner-up, out of twenty-two sites); it required the taking of land already dedicated to public use as park and townhall; and it was slightly more expensive.[148]

Analytically, the *Carmack* challengers were making a comparative rationality or preference-necessity attack by arguing that the chosen site was not the *best* one, rather than making a means-end argument that the site would not serve its purpose. In any event, based upon

---

[141] Kohl v. United States, 91 U.S. 367, 371 (1875).

[142] *See* Oklahoma v. Atkinson, 313 U.S. 508, 534 (1941).

[143] *See supra* notes 106–17 and accompanying text.

[144] *See* United States v. 1,096.84 Acres in Marion County, 99 F. Supp. 544, 547 (W.D. Ark. 1951); Puget Sound Power & Light Co. v. Whatcom County, 123 F.2d 286, 290 (9th Cir. 1941); United States v. Certain Parcels of Land, 30 F. Supp. 372, 379 (D. Md. 1939); United States v. Eighty Acres of Land, 26 F. Supp. 315 (E.D. Ill. 1939); Fox Film Corp. v. Trumbull, 7 F.2d 715 (2d Cir. 1925); United States v. Parcel of Land, 32 F. Supp. 718 (D. Del. 1940).

[145] *See* Shoemaker v. United States, 147 U.S. 282 (1893); Rindge Co. v. Los Angeles, 262 U.S. 700 (1923).

[146] 329 U.S. 230 (1946).

[147] *Id.* at 243–44.

[148] *Id.* at 233–45.

a thorough analysis of the particular facts,[149] the Court said that "it [was] unnecessary to determine whether or not this selection could have been set aside . . . if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned [citing the dictionary definitions thereof]. The record [presented] no such issue . . . ."[150] The Court, in other words, said it didn't reach the issue of voiding the condemnation for arbitrariness because, *having scrutinized it for arbitrariness*, they found it substantively nonarbitrary. This logical syllogism seemed to undertake the very inquiry it said it was avoiding.

A number of subsequent courts of appeal and district court decisions have in fact taken *Carmack*'s lead and, albeit deferentially, have actively applied substantive review. To be sure, even such courts declare that it is "only with reluctance" that they will review questions beyond *ultra vires* and public use,[151] but they will then proceed to do so in an extended range of circumstances. For example, when the United States Department of the Interior wanted to take property five years in advance of its proposed active use, the Third Circuit reviewed whether that timing was reasonable.[152] When a naval air field sought to condemn mineral rights as well as surface rights, the Ninth Circuit applied the arbitrariness test,[153] as it had in other cases, questioning the form of estate that had been condemned.[154] Meanwhile, the Eighth Circuit reviewed the desirability of a particular parcel to the practical operation and maintenance of a proposed reservoir;[155] the Tenth Circuit reviewed the choice of how much land to condemn;[156] the Fifth Circuit analyzed whether a parcel actually served project purposes;[157] the Second Circuit considered whether a federal taking of state lands for railroad purposes could be justified beyond its original wartime uses;[158] and the Seventh

---

[149] *Id.* at 232–36.

[150] *Id.* at 243–44.

[151] *See, e.g.*, United States v. Certain Parcels of Land in Philadelphia, 215 F.2d 140, 147 (3d Cir. 1954). In this case, the court said that "only with reluctance [would it] review any . . . decisions . . . such as the desirability of the particular property . . . the quantity of land necessary . . . or the particular estate required . . . ." *Id.* (citations omitted).

[152] *Id.*

[153] Southern Pacific Land Co. v. United States, 367 F.2d 161, 162–63 (9th Cir. 1966).

[154] *Id.*; *see also* state cases cited in *supra* note 114.

[155] United States v. Willis, 211 F.2d 1, 1–4 (8th Cir. 1954).

[156] United States v. Kansas City, Kansas, 159 F.2d 125, 127–30 (10th Cir. 1946).

[157] United States v. 2606.84 Acres of Land in Tarrant County, Texas, 432 F.2d 1286, 1290–91 (5th Cir. 1970).

[158] United States v. New York, 160 F.2d 479, 480 (2d Cir. 1947). This decision has been

Circuit reviewed, in terms of arbitrariness, condemnations of land by the United States for use in connection with a dam in the Mississippi River.[159]

The compromise these Courts of Appeal have struck between review and deference is nicely set out in several Seventh Circuit opinions. The courts will not put the government to the substantive test in cases in which defendants merely make "broadside allegations" of arbitrary and capricious action.[160] Such unsubstantiated arguments would not overcome the presumption of deference. But when defendants make detailed allegations that raise credible substantive arguments of arbitrariness, a court will occasionally proceed with particularized substantive review.[161]

The federal courts have treated the strong federal precedents rejecting substantive review, particularly the refusal to review "necessity,"[162] by acknowledging such holdings, and then going beyond them. They do not review in terms of "necessity," but in terms of "absolute necessity,"[163] "impossibility,"[164] or various arbitrariness-rationality reviews scrutinizing condemnations for "pervasive deception, unreasoned decision, . . . will of the wisp determination," where "no reasonable man could conclude that the land sought to be condemned had some association with the authorized project."[165]

The Burger Court appeared to join this parade of post-*Carmack* decisions in its *Midkiff*[166] opinion. Hawaii's Land Reform Act of 1967

---

interpreted as a substantive merits review case. *See* Southern Pacific Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966). It may, however, also be seen as another kind of purpose inquiry, deciding that salvage of investments was a legitimate federal purpose. *See* United States v. New York, 160 F.2d at 481 ("[T]he 'public use' which is said to justify the continued operation of the railroad is to get the greatest salvage for the Treasury, which no doubt will be by a sale for the full term.") (Hand, J., dissenting).

[159] United States v. 58.16 Acres of Land, 478 F.2d 1055 (7th Cir. 1973) (court said it would consider detailed allegations of arbitrariness). A number of district courts have echoed the willingness to review for substantive arbitrariness. *E.g.*, United States v. 23.9129 Acres of Land, 192 F. Supp. 101 (N.D. Cal. 1961); United States v. 18.2 Acres of Land, 442 F. Supp. 800, 812 (E.D. Cal. 1977).

[160] *See, e.g.*, United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975).

[161] *See* United States v. 58.16 Acres of Land, 478 F.2d 1055 (7th Cir. 1973). Of course, at the same time, other federal circuit courts were flatly refusing to review arbitrariness questions, repeating the standard rubric of absolute deference beyond review of public use.

[162] *See, e.g.*, United States v. Meyer, 113 F.2d 387, 392 (7th Cir.), *cert. denied*, 311 U.S. 706 (1940).

[163] Washington Metro. Area Transit Auth. v. One Parcel of Land in Square 164, C.A. No. 75-0056, at n.1 (D.D.C. Aug. 14, 1975) (LEXIS, Genfed library, Dist file).

[164] *Id.* at n.6.

[165] United States v. 2606.84 Acres of Land in Tarrant County, 432 F.2d 1286, 1290 (5th Cir. 1970).

[166] Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).

had provided that residential lessees on large private estates could force estate landowners to sell them fee simple title at fair market value. The Bishop Estate's trustees had argued in the Ninth Circuit, with surprising success, that this process violated the public-use limitation because the lands would be owned and occupied by private individuals. With a wave of the *Berman* wand, however, Justice O'Connor threw out the public-use argument, stating that

> [w]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. See *Berman v. Parker* . . . . On this basis we have no trouble concluding that the Hawaii Act is constitutional.[167]

Nevertheless, O'Connor thereby gave prominence, *beyond* public purpose, to the question of rational relationship of means to ends.

In the succeeding two paragraphs, O'Connor then went much further into the rational basis inquiry. Having concluded that the public purpose of dividing large bloc ownerships was proper, she further concluded that the Court could not "condemn as irrational the Act's approach to correcting the land oligopoly problem."[168] She weighed the market demand mechanism by which the statute worked, and the reasonable limits on purchasers that avoided the creation of new bloc ownerships, and summed up in a series of rational basis statements:

> This is a comprehensive and rational approach to identifying and correcting market failure . . . .[169]

> "[T]he [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective."[170]

> When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.[171]

---

[167] *Id.* at 241.

[168] *Id.* at 242.

[169] *Id.*

[170] *Id.* (quoting Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981) (emphasis in original)).

[171] *Id.* at 242–43. The Court, echoing the *Lochner* reaction, noted that the "wisdom" of socioeconomic regulation should not be reviewed. *Id.* at 243.

> Redistribution of fees simple . . . is a rational exercise of the eminent domain power.[172]

This rational basis analysis represents a significant tying together of jurisprudential loose ends in the case law. The *Midkiff* Court was clearly deferential to the legislature: public use is to be measured in terms of broadly proper public purposes irrespective of private possession and control. Yet, the Court also asserted that judges can and should review the rational relationship of legislative means to ends and actually consider arguments about whether there was a reasonable relationship of statutory means to ends.[173] In addition, the majority opinion construed the rationality inquiry in eminent domain as a *constitutional* requirement,[174] basing this inquiry on precedents drawn from general federal jurisprudence beyond condemnation case law,[175] including a test (if the legislature *could rationally* have believed) that echoes the *Universal Camera* arbitrariness test in remarkably close terms.[176] Finally, the *Midkiff* Court's combination of rational basis analysis with the public-purpose inquiry is significant because it apparently was not mere *obiter dicta*; it was a fundamental part of the holding.[177]

The *Midkiff* opinion accordingly has opened the door to active rationality review in subsequent federal cases in which credible challenges to the legislative choice of means are presented by condemnation defendants. The opinion avoids the anomaly of those courts that undertake substantive review of *ultra vires* and purpose questions but evade the often more significant question of rationality. The Supreme Court demonstrated in *Midkiff* that such review could be done without intruding into subjective legislative questions of "wisdom" and "necessity." Though the Court ultimately decided in favor of the legislature, it gave the individual condemnees a judicial hearing on the full range of substantive challenges.

Viewed in this perspective, the *Midkiff* opinion clearly went farther than *Carmack*, expressly applying the tests that the latter case had reserved. The Supreme Court's recent decision in *Nollan v. California Coastal Commission*[178] reinforced the tendency. Review-

---

[172] *Id.*

[173] *See supra* notes 167–72 and accompanying text.

[174] *See Midkiff*, 467 U.S. at 242–43.

[175] *Id.* (citing, *inter alia*, Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981); Vance v. Bradley, 440 U.S. 93 (1979)).

[176] *See infra* note 224 and accompanying text.

[177] *Midkiff*, 467 U.S. at 244–45.

[178] 107 S. Ct. 3141 (1987).

ing the rational nexus required between a physical exaction and the governmental purpose, Justice Scalia wrote for the Court that the judicial standard for testing the abridgement of property rights through the police power is the "'*substantial* advanc[ing]' of a legitimate state interest."[179] In making that determination and striking down the physical exaction, Scalia undertook an extraordinarily detailed scrutiny of whether the exaction in fact rationally served the various asserted governmental purposes. Taken together, *Midkiff* and *Nollan* extend an open invitation to the lower federal courts to undertake specific scrutiny of particularized allegations of means-end irrationality.

Notwithstanding *Nollan*'s censure of the California taking, however, it would be disingenuous not to note that in federal cases applying substantive means-end review, including *Midkiff*, virtually all past decisions have gone on to uphold the challenged governmental condemnation decisions. To what extent, then, is the proposition here of substantive rationality review weakened by the relative absence of cases using it to support *negative* holdings?

It is difficult to explain a constitutional basis for allowing substantive review of authority and public purpose without also permitting review of rationality.[180] Consequently, the dearth of decisions censuring eminent domain takings may be better explained by the courts' historical hesitancy to oppose legislative and executive initiatives absent Supreme Court support for active review. Now that there is not only a series of federal circuit court holdings[181] accepting substantive rationality review, but also the *Midkiff* decision's analysis explicitly including the rationality inquiry in eminent domain review, future court reviews can be expected to be more forthright. Instead of attempting to slip rationality issues into the purpose inquiry, they can address such issues directly, particularly if the familiar "rational decisionmaker" judicial formula is applied to the usual arbitrary and capricious test.[182]

3. Administrative Procedure Acts

There is irony and potential, finally, in the prospects for judicial review of eminent domain under federal and state administrative

---

[179] *Id.* at 3150 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

Although *Nollan* involved an exaction of land rather than a simple condemnation, the nature of the question, beyond compensation, was analytically the same, making *Nollan* an apposite and significant holding on eminent domain rationality review.

[180] *See infra* notes 276–77 and accompanying text.

[181] *See supra* notes 152–58 and accompanying text.

[182] *See infra* notes 211–32 and accompanying text.

procedure acts. The irony exists in the fact that such heavily litigated statutes have not yet been used, at least expressly, to secure substantive rationality review of condemnation takings. The potential for such litigation is self-evident: Title VII of the federal Administrative Procedure Act (APA), like many of its state counterparts, sets forth a broad presumption of reviewability for agency actions, and provides specific substantive and procedural tests.

Section 702, which asserts the broad reviewability of agency actions[183] and has been so interpreted by the Court,[184] provides only two areas of insulation: for express statutory exclusions and areas "committed to agency discretion."[185] These statutory exceptions do not seem to fit the eminent domain case. True, there are some areas of eminent domain jurisprudence that do contain extensive discretion—notably the subjective "close-call" decisions about project necessity noted earlier[186]—but many others are straightforward substantive issues capable of third party review. Nor, clearly, is section 702(b) a broad insulator of all decisions that involve any discretion, because section 706 specifically provides for review of discretionary decisions.[187] The areas in which implied preclusions are found include national security, diplomacy, and "political" questions,[188] all of which seem to be of a much higher order of national import than the condemnation of drainage ditches and parking lots, which, as we have seen, have nevertheless been effectively shrouded from review by the courts.

Given the clarity of the APA's review sections, it would seem that the burden is on the bureaucrats: if an eminent domain controversy fits the APA's terms for substantive review—posing issues of arbitrary decisionmaking—the courts presumptively must proceed to review and resolve them. Agencies would have a tough assignment in arguing that the vagaries of condemnation common law over the years have constituted a judicial repeal or amendment of the statute. Posed in those terms, such arguments would be rather easily answered. The drafting of statutory loopholes is not a job for judges, no matter how long they have repeated the conventional wisdom of limited eminent domain review. For judges to use the fifth amend-

---

[183] 5 U.S.C. § 702 (1982).

[184] *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 140–41 (1967).

[185] 5 U.S.C. § 702.

[186] *See* text accompanying *supra* notes 126–27.

[187] 5 U.S.C. § 706 (1982). "The reviewing court shall . . . (2) hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) . . . an abuse of discretion . . . ." *Id.*

[188] *See supra* note 137.

ment's public use text as a constitutional limitation on the APA terms would again miss the wrong point.[189] Therefore, since at least 1946, a clear statutory basis (indeed a statutory requirement) for substantive review of federal agency takings has lain incipient and unfulfilled.

The scarcity of cases seriously reviewing the rationality merits of condemnations under the APA might conceivably be explained by asserting that federal condemnation decisions over the years have been universally reasonable. The vast majority of condemnations indeed probably are rationally designed. In an area so charged with conflicting financial stakes and power positions, however, it strains credulity to think that the lack of such court reviews is based on federal condemnations' uniform irreproachability. Rather, the dearth of claims is probably better explained by the simple failure of lawyers to make the unfamiliar APA eminent domain review argument. That kind of failure is easily remedied, and, as the next section of this Article demonstrates, the substantive defense is based on substantial constitutional as well as statutory roots.

IV. The Meaning and Applicability of the "Arbitrary and Capricious" Test

The foregoing analysis of a particularized judicial rationality review in eminent domain cases does not require any innovations in constitutional theory. It draws upon a large body of substantive due process jurisprudence that has always been implicit in the notion of arbitrariness. The trick is to clarify and assemble a coherent practicable judicial test out of the unruly jumble of concepts embodied in the phrase "arbitrary and capricious."

Behind the dictionary meanings of arbitrariness lies too broad a range of meanings to expect that over the years it would have been understood and applied with any precision. Such meanings run from "determined by whim or caprice," "despotic," "absolute," and "dictatorial" to "for erroneous reason" and "without consideration or adjustment with reference to principles, circumstances or significance."[190] Thus, it is hardly surprising to find the arbitrariness con-

---

[189] Whatever the fifth amendment was intended to do, it clearly does not provide constitutional immunities from review where statutes fail to so provide.

[190] Ballantine's Law Dictionary 88 (3d ed. 1969) (citing Mutual Benefit Life Ins. Co. of Newark v. Welch, 71 Okla. 59, 64, 175 P. 45, 49 (1918); United States v. Carmack, 329 U.S. 230, 243 n.14 (1946), *reh'g denied*, 329 U.S. 834 (1947)).

The meaning of arbitrariness can be found in sources other than case law:

> Thinketh, such shows nor right nor wrong in him nor kind, nor cruel: He is strong and Lord. Am strong myself compared to yonder crabs that march now from the

cept treated so amorphously and in so many different senses that it often seems to lack any particular or useful meaning. By failing to define its meaning clearly, however, courts not only end up using the same term for different issues, but also confuse issues in the process, severely crimping the concept's effectiveness as an analytical tool.

Insofar as this hesitancy to provide a clear definition is attributable to vagueness, confusion, and amorphousness in the meaning of arbitrariness, clarification currently seems possible. Insofar as it is attributable to ideological and jurisprudential concerns, the time likewise appears propitious for active acknowledgement of judicial review of rationality.

A. The Four Basic Inquiries in Substantive Judicial Review

Dividing the areas of substantive judicial scrutiny (beyond particular statutory requirements) into four separate diagnostic inquiries can clarify the arbitrariness test and many other issues of judicial review.[191] These four substantive inquiries are discernible throughout the case law, and appear to encompass all nonstatutory substantive questions typically raised in judicial review of governmental action. Zoning cases, which offer frequent and familiar (if homely) examples of constitutional challenges, provide an area of litigation that helps illustrate issues in all four substantive categories.[192]

1. Authority

A challenger to a zoning decision can assert the government's lack of general or specific authority to act. Such a challenge presents an

---

mountain to the sea. Let twenty pass, and stone the twenty-first, Loving not, hating not, just choosing so.

Browning, *On the Caban*, in POEMS OF ELIZABETH & ROBERT BROWNING 237 (1942). The complaint of the twenty-first crab is not that there was no norm or standard being applied to it, but rather that the standard applied ("the twenty-first") was not a good, fitting, proper, or sufficient reason.

[191] *See supra* note 12.

[192] *See* District Attorney v. Board of Trustees of Leonard Morse Hosp., 389 Mass. 729, 452 N.E.2d 208 (1983); Erie R.R. v. Steward, 17 N.Y. 172, 53 A. 118 (1902). Both of the foregoing cases consider *ultra vires* challenges to the exercise of eminent domain power. *See also* R & R Welding Supply Co. v. City of Des Moines, 257 Iowa 973, 129 N.W.2d 666 (1964); Abolt v. City of Fort Madison, 252 Iowa 626, 108 N.W.2d 263 (1961); Wayne Village President v. Wayne Village Clerk, 323 Mich. 592, 36 N.W.2d 157 (1949) (all cases noting necessary element of proper public purpose); cases at *supra* notes 103–04 (raising questions of a rational means-end relationship). The fourth area—that of individual burden—is by far the most frequently litigated, often in terms of just compensation.

ultra vires question, which clearly is constitutional.[193] Ultra vires challenges involve substantive inquiry because they dispositively review the foundation of the right by which the government constrains private interests in the possession, use, and enjoyment of an individual parcel of property.

In the zoning setting, a plaintiff may attack a municipality by alleging that it has no power to pass a particular zone regulation for lack of sufficient delegated power under the state enabling statute, by alleging preemption of local or state authority, or the like. The same inquiry, of course, can be found in other kinds of cases throughout the range of federal and state regulatory actions arising under the police power and correlative powers ceded to the federal government.[194] This inquiry is analytically a threshold question, not a focus on the particular merits of the governmental act challenged.

2. Proper Public Purpose

The second category of challenges addresses proper public purpose. Zoning laws, for example, were originally attacked as not fitting within the "general welfare" component of the police power's classic triad of basic regulatory purposes: health, safety, and welfare.[195] Once *Euclid*[196] established that the harmony of planned development constituted a proper, generalized public-welfare purpose, the attacks shifted to attempts to define further improper particularized purposes.

Such narrower "poison purpose" allegations have included, with varying degrees of success, claims that a regulation was "purely aesthetic," for "purely private purposes," motivated by a desire to drive down land prices for future condemnation, racially exclusionary

---

[193] *See, e.g.*, U.S. CONST. art. II, § 2, art. 1, § 3; Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (Civil Service Commission regulation barring noncitizens including lawfully admitted resident aliens, from employment in the federal competitive civil service held unconstitutional as a deprivation of due process); Greene v. McElroy, 360 U.S. 474 (1959) (in the absence of explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross examination); Garfield v. Goldsby, 211 U.S. 249 (1908) (it is a violation of due process of law to deprive one of rights in an administrative or judicial proceeding without notice or opportunity to be heard).

[194] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, *reh'g denied*, 297 U.S. 728 (1936); Garfield v. Goldsby, 211 U.S. 249 (1908); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); Federal Trade Comm'n v. Raladam Co., 283 U.S. 643 (1931); Zuber v. Allen, 402 F.2d 660 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 1013 (1970).

[195] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[196] *Euclid*, 272 U.S. 365.

or otherwise invidiously intended to discriminate, or impermissibly protected individuals against their own rugged wills.[197] Analogous attacks are regularly posed in other regulatory settings as well.[198] This inquiry as to proper public purpose, too, is a form of threshold question, testing the propriety of the governmental objective rather than the nature of the actual decision itself.

3. Merits Review—Means Rationally Related to Ends

The third category of challenges involves attacking a regulation on its merits for lack of a *rational relationship of means to ends*, the area of substantive scrutiny most directly involved in the eminent domain review controversy examined in this Article. Where the purposes of challenged governmental actions are perfectly proper, the design of an ordinance or the factual reasoning supporting a decision may nevertheless be insufficiently, illogically, or erroneously related to achieving the purposes. Thus, zoning acts have been struck down, as applied to specific parcels, when the lines drawn are found to bear no rational nexus to purpose or when the pattern of regulation has insufficient supporting data or planning.[199] For example, a floodplain safety zone cannot rationally be applied to

---

[197] Corthouts v. Town of Newington, 140 Conn. 284, 99 A.2d 112 (1953); Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955); Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956); Kozensnik v. Montgomery Twp., 24 N.J. 154, 131 A.2d 1 (1957); *cf.* Comment, *States Power to Require an Individual to Protect Himself*, 26 WASH. & LEE L. REV. 112 (1969).

Note also that in some cases, a particular regulation might be attacked on the ground that its purpose lies outside the grant of delegated powers, for example, where a city zones innovatively for "greenbelt" or "earthquake safety zone" purposes that are not clearly set out in the enabling act, thus involving both the first and second categories of inquiry.

[198] American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968) (Court of appeals held that an amendment requiring motorcyclists to wear helmets was unconstitutional since it had no relationship to public health, safety and welfare.). In a later case, the Supreme Court of Michigan holds that the legislature may require motorcyclists to wear helmets as part of a highway safety program to reduce the consequences of accidents. People v. Poucher, 398 Mich. 316, 274 N.W.2d 798 (1976).

[199] The classic *Euclid* case can be read for the basic proposition that zone districting lines were rationally related to achieving public welfare, even if no particular injury could be related to particular lines, if they were based upon an expert comprehensive plan. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–88 (1926). The comprehensive plan thus became the standard requirement for a supportive relationship between means and ends in zoning. "Insufficient supporting data" means that the record does not show sufficient evidence to allow a court to say that the decision or means are indeed rationally related to achieving ends, though further evidence might or might not show a rational relationship. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).

hilltop land,[200] a residential zone cannot be applied to land that could never be used for residences.[201]

Analytically, moreover, this third means-end inquiry may also incorporate "least drastic means"[202] and equal protection review. Thus, when a zone discriminates against poor people or mobile homes, its distinctions and classifications can be challenged as not rationally related to the purposes of zoning.[203] Beyond zoning, this third inquiry can be widely discerned in judicial declarations that governmental determinations and classifications must "have reasonable relation to a proper legislative purpose, and [be] neither arbitrary nor discriminatory [to satisfy] the requirements of due process,"[204] and must "rationally advance . . . a reasonable and identifiable governmental objective."[205]

4. Burden

The fourth inquiry, the degree of burden imposed on the individual, is often the emotional heart of substantive review. Its most common manifestation is the individual takings burden in regulatory cases, which asks a question basic to justice and democracy: how far can the collective power of the majority erode the property of the individual for the sake of public well-being? The usual answer in regulatory takings cases is what one of the authors has previously

---

[200] Sturdy Homes, Inc. v. Redford, 30 Mich. App. 53, 186 N.W.2d 43 (1971); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 20–22, 283 A.2d 353, 358–59 (1971).

[201] *See* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (The master prior to trial reported "no practical use can be made of the land . . . for residential purposes."). *But cf.* Nectow v. City of Cambridge, 260 Mass. 441, 448, 157 N.E. 618, 620 (1927) (holding that the residential zone *did* serve a valid purpose, as a low-density buffer zone), *rev'd*, 277 U.S. 183 (1928). *Nectow* should probably have been reviewed under the takings burden test. The residentially restricted strip would then have been averaged in with the large contiguous industrially-zoned property. As it was, the case reviewed rational relationship, and turned ultimately on the definition of which "purpose" was relevant: the literal reading of an R-2 zone as intended to promote residential use, or the planners' purpose of using zone sectors as buffers and transition zones.

[202] *See infra* note 242 and accompanying text.

[203] *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed* and *cert. denied*, 423 U.S. 808 (1975); BROOKS EXCLUSIONARY ZONING 3 (Am. Soc. of Planning Officials, 1970); Gust v. Township of Canton, 342 Mich. 436, 70 N.W.2d 772 (1955); Commonwealth v. Amos, 44 Pa. D. & C. 125 (1941). This claim can also be cast as an attack on the governmental purpose if it is alleged that regulations impermissibly seek to exclude, especially with relation to race, national origin or creed.

[204] Nebbia v. New York, 291 U.S. 502, 537 (1934).

[205] Schweiker v. Wilson, 450 U.S. 221, 235 (1981). The latter part of the quotation is clearly directed at establishing a proper public purpose.

dubbed the "residuum" takings tests.[206] According to these tests, property owners must be left with a beneficial (or "profitable" or "reasonable") remaining use of their regulated property. These various versions of the diminution test require a fair amount of implicit balancing of potential public harms against private property losses, but, if such balancing is done, offer a workable and philosophically defensible test for application far beyond the field of land-use regulation.[207] Of course, when physical appropriation of property is involved under eminent domain, the fourth inquiry is less a balancing than a straightforward measure of governmental payment at fair market value rates to compensate the burdened individual for property rights taken.

5. Procedural Problems

For the sake of comprehensiveness, it should be noted that courts also apply at least two different kinds of procedural scrutiny beyond strict statutory requirements. One type of scrutiny is the set of requirements owed to individuals in the form of procedural due process. This flourishing sector of constitutional litigation raises questions of notice, hearing, the clarity of legal standards to be applied, and the opportunity to review the application of a law to a particular case.[208]

The second type is that class of procedural requirements owed to the courts themselves. In order for federal courts to fulfill their article III functions (and state courts their correlative duties), the processes of government must be such that they will produce a meaningful, reviewable record. Such a record must illuminate the basis of official actions and show whether the governmental actors

---

[206] *See* Plater, *Takings Issue*, *supra* note 6, at 232.

[207] In a contextual vacuum, based exclusively upon losses to the one regulated parcel measured exclusively in terms of the marketplace's estimation of profitability. This ignores the dangers and external economic costs that might be caused by the unregulated parcel, and thus ignores the very reason the police power was applied in the first place. Indeed, in some cases where unregulated parcels would impose large public injuries, a total diminution of private property value may be rational, fair, and constitutional. *Id.* at 245–51.

[208] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (all affected parties must have an opportunity to be heard); Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance recipient entitled to a pre-termination hearing); Perry v. Sindermann, 408 U.S. 593 (1972) (teacher at state college entitled to prove his claim that the non-renewal of his one-year contract was without sufficient cause). The Supreme Court's modern approach to procedural due process adjudication is articulated in Matthews v. Eldridge, 424 U.S. 319 (1976); *see infra* note 335 and accompanying text.

have at least considered the relevant factors in reaching their determinations.[209]

B. Pinning Down "Arbitrary"

If indeed courts accept their more-than-theoretical responsibility for testing government condemnation actions substantively for "arbitrariness," there remains the question of what that test means and how it can be applied. Unfortunately for any attempt to clarify the meaning of "arbitrary and capricious," the phrase has not been limited in practice to the bounds of any of the six basic categories of judicial inquiry noted here.[210] Consequently, the delineation of these categories does not in itself usefully narrow down the analysis of when the phrase is employed. Indeed, judicial use of the "arbitrary" rubric, and the parallel rationality concept,[211] can be found in *all six* of the delineated areas of judicial inquiry, procedural as well as substantive.

A brief survey not only demonstrates the uncritically broad range of applications given to the arbitrary-rationality concept, but also argues by aversive example for use of clearer terms based on clearer analysis.

When the Supreme Court, for example, struck down a federal Indian lands regulation as an "exercise of arbitrary power," it was clear on closer reading that the justices meant that the regulation was *ultra vires* for lack of authority,[212] our first category of substantive tests of governmental power. The Court could well have said so directly and been a lot clearer thereby. When, in another case, the justices voided as "wholly arbitrary" a Maryland statute that indirectly subsidized farmers and water-users, they were not saying that the statute would not accomplish its purpose, or that the pur-

---

[209] Even where he wished to restrict procedures required of agencies, as in Vermont Yankee v. NRDC, 435 U.S. 519 (1978), Justice Rehnquist noted that agencies must supply a sufficient record for the courts to review: "[t]he validity of [the] action must 'stand or fall on the propriety of [contemporaneous findings] . . . . If [those] finding[s] [are] not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'" *Id.* at 549 (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)). *See infra* notes 237, 250 and accompanying text.

[210] *See supra* notes 193–209 and accompanying text.

[211] The phrase "arbitrary and capricious" can be seen as the negative formulation of the "reasonableness" standard. They are mirror images of the same concept. As the succeeding analysis shows, they share a wide range of application.

[212] Garfield v. Goldsby, 211 U.S. 249, 262 (1908). In *Garfield*, there were also allegations of a violation of procedural due process for lack of hearings, but the Court made clear that the decision turned on lack of delegated authority. *Id.*

pose was purely whimsical, but rather that the purpose was *improper*.[213]

Similarly, in the third area of inquiry, in which the basis for a regulation does not support the rule, a court may call the regulation arbitrary instead of saying that it lacks support.[214] In equal protection cases, the terms are similarly confused.[215]

The fourth area of inquiry, the "takings" issue as it concerns the imposition of excessive property burdens on the regulated individual, is not much different. Courts have struck down regulations, most often in zoning cases,[216] as void for "arbitrariness" in circumstances in which the court clearly meant that the takings effect weighed on the plaintiff in impermissibly burdensome terms, not that the regulations' purpose or implementation were creatures of caprice. It would be far better in such circumstances to describe such results as an invalid or excessive regulatory taking rather than to use the opaque term "arbitrary."

Procedurally as well, the word "arbitrary" fuzzily haunts the cases. If an individual fails to get proper notice of a proceeding, or is denied an opportunity to respond adequately, or if the agency fails to consider a relevant issue or to explain its decision adequately for the purpose of a reviewing court, in each case the result may be termed "arbitrary"[217] even if it would be far more illuminating to describe the particular procedural fault in its own terms. As a result, whenever readers see the phrase "arbitrary" used in a judicial opinion or legal text, including this one, they should attempt to define *which* sense of the word is being used. The task is not always easy. In most cases, the "arbitrary" rubric, if not wholly a misnomer, serves a much less enlightening denotative function than alternatives available. Far better for judges and scholars to use more specific and direct terms where possible: terms of *ultra vires*, impermissible purpose, insufficient supporting fact or logic, excessive takings burden, and so on.

---

[213] Smith v. Cahoon, 283 U.S. 553, 567 (1931), discussed in Ely, *supra* note 22, at 1225.

[214] Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[215] *E.g.*, United States v. Buckeye Steamship Co., 183 F. Supp. 644 (N.D. Ohio 1960), *aff'd*, 287 F.2d 679 (6th Cir. 1961).

[216] *See, e.g.*, Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961); Longshore v. City of Hoover, 454 So. 2d 954 (Ala. 1984); Griffen Development Co. v. City of Oxnard, 39 Cal. 3d 256, 217 Cal. Rptr. 1, 703 P.2d 339 (1985); Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979).

[217] Greene v. McGuire, 517 F. Supp. 1330, 1333 (S.D.N.Y. 1981); Fuentes v. Shevin, 407 U.S. 67, 81, *reh'g denied*, 409 U.S. 902 (1972); Remm v. Landrieu, 418 F. Supp. 542, 544 (E.D. La. 1976).

In pinning down the most direct and appropriate substantive usage of the term "arbitrary," two settings seem particularly apt for its application. Both settings lie in the third category of judicial inquiry and offer a linkage between rationality and arbitrariness review. One setting is when a governmental decision has no guiding standard, or so vague a norm as to lack a principle for decision. Such an agency decision is "arbitrary" in the sense that neither agency nor reviewing court can explain its normative basis. The second situation is the broader means-end setting, which has particular application in eminent domain review. When a governmental entity on the merits has a proper purpose or standard to apply but lacks a rationally supportive factual basis upon which to reach its particular normative determination, its decision is based on "whimsy, caprice, or error" in a truer sense than that encountered in the other noted areas of judicial inquiry.[218]

"Reasonableness" and "rationality" are decisional terms that are equally perplexing. They not only constitute the mirror image of "arbitrary"—so that defining the latter goes a long way toward defining them as well—but they are also used in the same promiscuously wide-ranging array of applications. The judicial concept of rationality will be explored further later on, but at this stage it is

---

[218] The term "arbitrary" does not accurately fit questions of improper purpose, or of lack of authority. An improper purpose renders a government act void precisely because it is improper. It may have been a very deliberate and conscious improper decision; "arbitrary" it was not. Where is the caprice or "whimsy" in an allegedly arbitrary *ultra vires* action of government that on its face had a sensible purpose, and a reasonable basis for achieving it, yet simply lacked properly delegated power, perhaps due to a technicality? The *ultra vires* question, a separate inquiry from that of rationality "means-end" analysis, involves solely the question of whether or not the actor possessed the lawful power to act in a given situation. *See supra* note 193. Even with respect to a totally benign objective, the *ultra vires* action may nevertheless be invalid for lack of statutory authorization of such action. Presidents may choose to "pass" a perfectly reasonable, rational "decree," but clearly they are not vested with legislative power. Such a decree will be held unconstitutional, however rationally and expediently it may further a legitimate government objective. Conversely, one cannot question the fact that the Tennessee Valley Authority possesses the authority to build dams for flood control purposes. But let it build such a dam in an area that has never seen flooding, and its action is subject to judicial sanction because, while clearly statutorily *authorized*, it nevertheless holds no rational relationship to the stated objective. Thus, the *ultra vires* issue is a threshold question: if resolved in the negative, the "means-end" question need not be reached. Similarly, it appears to miss the point of "arbitrary" to apply it to deliberate agency failures to provide procedures or explanations.

Moreover, the legal use of the term "arbitrary" should mean more than the layperson's concept of inexorable chance. When a desperado who has shot a cowpoke in the Stateline Saloon faces either a maximum sentence of life imprisonment, or death, depending upon which of two state jurisdictions the victim falls into, that difference in potential penalties may seem "arbitrary," but it is not the kind of arbitrariness that the courts consider improper.

sufficient to note that, like the arbitrary and capricious rubric, rationality is far more fittingly analyzed and applied to means-end inquiries than when it is applied haphazardly to questions of improper authority, purpose, or takings burden.

C. Defining "Arbitrary"

1. A Legal Formula

Deciding that the most appropriate locus for arbitrariness tests lies in substantive means-end, merits review does not in itself define any terms sufficiently to permit their use by courts and jurists. In what terms does the inquiry cast itself when a court seeks to review whether governmental "means" are "rationally related to ends?" Left in such terms, the inquiry remains fairly amorphous, hence merely conclusory.

Fortunately, the formulation of the terms for a judicial test of rationality is not difficult. Decades of administrative law cases reviewing governmental actions under the "arbitrary" and "substantial evidence" tests have developed an analytical construct based upon both constitutional and statutory roots[219] that serves judicial needs and capabilities. In truth, the substantial evidence test and the arbitrary and capricious test are constructed of precisely the same logical elements. Only differing degrees of judicial deference to official actions separate their application into two disparate lines of jurisprudence.[220]

---

[219] The federal APA provides for both standards of review in appropriate cases. There is a difference between "scope of review" and "standard of review." The "scope of review" denotes the breadth of record on appeal for consideration by the reviewing court. "Standard of review" denotes the level of scrutiny and the degree of deference adopted by the court with respect to the decision under review—arbitrary and capricious, substantial evidence, clearly erroneous, etc. *See* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 941 (1976). As argued below, the judicial review tests have a constitutional as well as statutory source. *See infra* note 276 and accompanying text.

[220] Administrative lawyers and courts, however, have typically treated the two tests as different, a supposition reflected in Justice Harlan's statement that the "'substantial evidence test' afford[s] a considerably more generous judicial review than the 'arbitrary and capricious' test." Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967). On the other hand, in Associated Indus. of New York State, Inc. v. United States, 487 F.2d 342, 349–50 (2d Cir. 1973), Judge Friendly repeated the observation in Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899 (1973) that, "try as we may, it is difficult to find any separate meaning for ['arbitrary']." The *Associated Industries* court noted that "it is hard to see in what respect we would have treated the question differently if we had been applying a 'substantial evidence' test." Commentators have suggested that, in the "class of cases in which the ground for challenging the agency action is the inadequacy of its

Most agency determinations involving questions of fact are judicially reviewed under either the substantial evidence test or the arbitrary and capricious test, depending upon whether or not they derive from formal proceedings.[221] Analytically, all agency determinations come down to the same thing: the court must decide that a reasonable official could have made a particular governmental decision, given the factual "record"[222] in the case and the particular legal norms to be applied to it.

Mr. Justice Frankfurter established the classic test of substantial evidence review in *Universal Camera Corp. v. NLRB*.[223] According to Frankfurter, governmental decisions must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion."[224] The arbitrary and capricious test can

---

evidentiary basis, it is difficult to imagine a decision having no substantial evidence to support it which is not 'arbitrary,' or a decision struck down as arbitrary which is in fact supported by 'substantial evidence' . . . ." *Associated Indus.*, 487 F.2d at 349 (quoting Scalia & Goodman, *supra*, at 935 n.138) (citations omitted); *see also* Wood v. United States Post Office Dept., 472 F.2d 96, 99 n.4 (7th Cir.), *cert. denied*, 412 U.S. 939 (1973). The federal APA lists the two tests as separate and cumulative. 5 U.S.C. § 706(a), (e) (1982). Thus, in reviewing a formal proceeding, a court would first consider whether the decision was arbitrary, then go on to ask whether it was supported by substantial evidence. No cases were found, however, where a court articulated any substantive difference between the two inquiries. The cumulative syntax of section 706 makes no obvious sense and is probably just one of many little flaws in the web of administrative law.

There are *procedural* situations in which government actions might pass muster under the arbitrary and capricious test, yet fail under the substantial evidence test. This result would occur when courts required more formalized records under the substantial evidence test, or required a greater quantum of facts to constitute sufficient supportive evidence as a matter of lessened deference. Morgan v. United States, 304 U.S. 1, *reh'g denied*, 304 U.S. 590 (1938); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978). But the ultimate test remains the same.

[221] APA, 5 U.S.C. §§ 554, 556–557 (1982). Statutes may and often do specify standards of review, usually tying formal proceedings to the substantial evidence test, but not always. *See, e.g.*, Endangered Species Act, § 7, 16 U.S.C. § 1536(n) (1982) (less-than-formal proceedings are to be reviewed under the substantial evidence test). The less frequent standards—clearly erroneous, review de novo, or trial de novo—are virtually always statutory and always require a difficult judicial process of figuring out what exactly they mean. Hence the familiarity of the substantial evidence and arbitrary and capricious tests seem to have contributed to their increasing dominance of the field.

[222] The "record" in informal proceedings is not the same thing as a formal record. Courts refer to the record on review as comprising whatever portion of the facts is produced by the parties for appellate consideration.

[223] Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–89 (1951) (updating the definition of review set out in Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)).

[224] *Id.* at 477. As to statutes, the judicial formulations include: "whether . . . the legislature rationally could have believed that the [Act] would promote its objective." Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981); *see also* Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 466, *reh'g denied*, 450 U.S. 1027 (1981); Vance v. Bradley, 440 U.S. 93, 111 (1979).

mean no less. A governmental decision that failed to pass the substantial evidence test, on a judicial finding that a reasonable mind could not have found the facts adequate to support the conclusion, must equally well have failed scrutiny on the "lower" standard of arbitrary and capricious review. Both tests require that the normative conclusion as defined by relevant legal standards be supported by sufficient facts. Under the arbitrary and capricious standard, lacking facts to support the normative conclusion in a reasonable person's mind, the decision likewise fails.[225]

Thus, the operative difference between the substantial evidence and arbitrary and capricious tests appears to lie primarily in the practical degree of deference each test receives.[226] The difference in deference does not lie in any analytical dissection of what elements constitute a "passing" or "failing" rating for a particular decision, but more in the "mood" of the reviewing court.[227] The substantial evidence test is characterized as possessing a stricter "mood," inviting more vigorous judicial scrutiny of governmental decisions, and both judges and litigants act upon that premise.[228]

Semantically, the two tests reflect this difference in presumptions of validity. The phrase "substantial evidence" focuses on what quantum of evidence *the government* must show in order to justify a challenged agency decision. The syntax of "arbitrary and capricious" focuses upon *the citizen challenger's* burden in overturning an agency

---

[225] *See* Associated Indus. v. United States, 487 F.2d 342, 349 (2d Cir. 1973).

[226] There is often, though not always, a difference in the formality and scope of the "record" upon which review is based, but this does not change the elements of the ultimate *standard* of review. *See supra* note 219 and accompanying text.

[227] *Cf.* Universal Camera v. NLRB, 340 U.S. 474 (1951). Justice Frankfurter stated that in applying the statutory term "substantial evidence," which was "so elusive that it cannot be precisely defined," the courts might have to find its meaning "more by the demonstrable forces that produced it than by its precise phrasing." *Id.* at 489. And in determining what that legislative background was, "[i]t is fair to say that in all this Congress expressed a mood . . . [that] must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules." *Id.* at 487.

[228] First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974) (record failed to establish that Comptroller acted arbitrarily and capriciously in approval of national bank application), *cert. denied*, 421 U.S. 930 (1975). The *Fayetteville* court further noted that "[t]he arbitrary and capricious standard of review . . . is more restrictive [of the court] than the 'substantial evidence' test." *Id. Accord* Temple Univ. v. Associated Hosp. Serv., 361 F. Supp. 263, 271 (E.D. Pa. 1973) (review under the arbitrary and capricious test more limited than under the substantial evidence test). *See also* Camp v. Pitts, 411 U.S. 138, 141 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The requirement of an adequate record, featured in both *Overton Park* and *Camp v. Pitts*, is a backhanded way of establishing the rationality requirement. If courts send decisions back to agencies because of insufficient supporting factual records on review, they are implicitly holding that without such supporting facts the decision cannot be upheld.

decision. In theory, governmental decisions in both cases are favored with a presumption of validity, but courts are far more willing to undertake vigorous scrutiny of the former. That willingness accounts for the difference in deference and in burden of proof echoed in the semantic labels of the tests. The "mood" of the substantial evidence test has accordingly led in practice to a greater number of instances in which agency decisions have been overturned.[229]

A further distinction between the tests is that, in practice, the *quantum* of fact required to support particular decisions may differ. Given the lesser degree of deference accorded under the substantial evidence test, more facts may be necessary to provide adequate evidence to support a reasonable mind's decision thereunder than for decisions tested under the arbitrary and capricious formula. This distinction is reflected in the differing requirements for an agency's record on review. Substantial evidence review usually requires a formal record, incorporating all hearing testimony and all evidence considered by the agency in making a particular decision.[230] The "record" in reviews of agency determinations under the arbitrary and capricious standard can be far less comprehensive. It need contain only enough facts to show the court that the normative decision is rationally based; it is compiled ad hoc by the agency and litigating parties as they see fit.[231] Nevertheless, there must be sufficient facts. An informal decision that is backed by a record on review that fails to manifest sufficient supporting facts will be sent back to the agency.[232]

Analytically then, the elements of the arbitrariness inquiry come down to familiar terms. If a court decides that a reasonable mind,

---

[229] This tendency was evident from the beginning, starting with *Universal Camera.*

[230] *Cf.* Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974) (application of substantial evidence review of informal proceedings explained as a pragmatic "legislative compromise").

[231] *E.g.*, First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371, 1375–76 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975).

[232] As noted at text accompanying *supra* note 19, there is an astonishing dearth of cases in which federal courts have actually stricken agency actions as arbitrary and capricious. In keeping, no doubt, with their conception of deference, the courts have been far more willing to remand to the lower courts, or to the agencies themselves, to supplement the factual record so that it can support the agency determination. As in *Overton Park* and *Camp v. Pitts*, the Court may suspect that the agency has no evidence, and the remand is merely a discreet method of nullifying a decision without publicly declaring it arbitrary, as those cases subsequently demonstrated. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973). In a few cases the Court has actually declared an agency action arbitrary. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).

given the legal norm to be applied and the particular facts of the case, could not have reached that particular determination, the governmental action is void for arbitrariness.

2. Defining the Rationality of a Reasonable Mind: Benefits, Costs, Alternatives

a. Benefits and Costs

Extending Frankfurter's *Universal Camera Corp. v. NLRB* formulation of a legal test of irrationality[233] to the field of arbitrary and capricious reviews does not end the inquiry. It remains to be asked how a reasonable mind determines whether facts adequately support a particular normative conclusion. The answer is easy if there are *no* relevant facts to support a conclusion, and substantial facts that deny it. Such cases clearly demonstrate a total lack of logic. But, in the real world, there are almost always some facts that arguably have some probativeness. (The fact that a person has a Germanic name offers *some* indication that she might be German, but alone clearly would fail to provide a rational basis for such a conclusion.) Rational decisions are based upon a comparative weighing of positive and negative pieces of information. The question then becomes one of proportionality, logic, relevance, contexts, and judgment.

Defining the meaning of "rationality" or "reasonableness" is an awesome task, even if the goal is limited to definitions of governmental rationality in the particular narrow context of judicial review. Yet the concept of rationality turns up so often as part of basic tests of governmental conduct that a failure to develop a workable definition for it condemns those tests to perpetual subjectivity.

One useful approach to defining rationality can be found in the fact that most human actions, decisions, and determinations are made with one or (usually) more goal objectives, norms, or values in mind. Governmental actions are no different, and offer the further advantage that, when governmental powers are used to constrain the rights of individuals, in each case the particular governmental purpose that justifies the action must be both delineable and proper.[234] Accordingly, the rationality question can initially be approached through the context of governmental objectives, and this

[233] Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951).

[234] As analyzed herein, the definition of a proper governmental purpose is basic to the judicial review inquiry on its own terms; it also has relevance to the ultra vires authority inquiry and logically serves as the basis of any means-end analysis.

avenue opens up a further use for the diagnostic categories developed earlier above.

Viewed from this perspective, the test of rationality or reasonableness[235] includes means-end analysis as a basic component. Determining whether decisions to require airbags in cars, or to prohibit insider trading, are reasonable, means asking whether the regulatory terms chosen are rationally related to the achievement of defined purposes: auto safety, the fair and open marketplace, or whatever.

Determining whether the governmental choice of means is rationally related to ends also requires an updated exercise in cost-benefit analysis. Cost-benefit analysis does not have to mean the dollar-based balance sheet so beloved of Chicago economists, nor the corporate sector reckoning of modern so-called "regulatory reformers."[236] Rather, judicial review requires a rehabilitated and conceptualized overall cost-benefit analysis. According to such an analysis, a governmental decision is "rational" when a comparative weighing of positive, supportive facts and negative, detractive facts produces a net quantum of fact that, on balance, supports the decision.

This balance is clearly not exclusively nor even primarily financial, despite the "cost-benefit" rubric. But, when defined as a balance of factual concepts and values as well as dollars, it provides a realistic description of how rational minds make decisions. When reasonable persons make decisions in their everyday lives—whether to buy a new car; whether to vacation in Florida, Tibet, or at home; whether to paint the house—they weigh a wide array of factors and values, positive and negative.

Governmental decisionmakers are similarly affected by a wide array of considerations beyond finances: questions of practical feasibility, varying statutory mandates, political consequences, pressures from powerful members of the legislature and the chief executive, the potential effect on the private sector, and so on. Unlike the decisions of individual citizens, however, governmental decisions are held to a narrow range of proper considerations when subjected to judicial review. An agency cannot say "we decided to amend that rule because the President and his allies didn't like it," even though that reason may indeed have been the primary and dispositive cause

---

[235] The terms are assumed to mean the same thing. An act is "unreasonable" when it lacks rational basis, or basis in a good and sufficient reason. Just any old reason does not make a decision "reasonable." Reasonableness is an overall rational conclusion.

[236] *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); *State Farm*, 463 U.S. at 49.

for the amendment. On Capitol Hill and in the corridors of the executive branch, that reason may be good enough, and may even be openly avowed. Courts, however, with only a few aberrant dicta to the contrary, require agencies to justify their decisions in terms of their *purported* delegated purposes, in terms, in other words, of accomplishing their statutory objectives.

Thus, in *Motor Vehicles Manufacturers Association of the United States v. State Farm Mutual Auto Insurance* it may well have been, as Justice Rehnquist wrote, that the Reagan Administration's scrapping of the automobile airbag regulation was merely a function of who had won the election.[237] In that case, however, one of the few notable recent cases in which a governmental action was found to be "arbitrary," the Court nevertheless sent the agency back to prepare a factual record that demonstrated a justification on the merits, a means-end relationship showing how the decisional balance of facts, in light of the continuing statutory auto safety purposes, had changed since the Carter Administration so as to support the new conclusion.[238]

Nor will the recitation of a bare minimum of one-sided factual allegations (that taken alone in a vacuum might tend to support a challenged governmental decision) be automatically sufficient to satisfy judicial means-end review. The courts have long been willing to consider what facts weigh probatively on the plus/minus, cost/benefit sides of the scales, giving to each a "fair estimation of worth" in achieving governmental purpose.[239]

---

[237] *State Farm*, 463 U.S. at 59. Then Justice Rehnquist thus explained the Reagan Department of Transportation's reversal of the prior auto safety regulatory decision as "related to the election of a new President of a different political party . . . . [T]he responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration . . . . As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Id.* at 59 (Rehnquist, J., dissenting). Rehnquist's comments accepting political pressure sound like unexceptionable legal realism—Republican invective had long been focused on the "wasteful" airbag—until one recognizes that such a judicial approach would ultimately collapse judicial review into an acceptance of power politics decisions without consideration of objective merits. *See infra* note 356.

[238] In *State Farm*, the agency had indeed made efforts (found to be insufficient) to justify the new decision with new facts, which demonstrates how the prospect of judicial review does in fact encourage agencies to base their actions on a factual record reflecting the merits. *State Farm*, 463 U.S. at 47–51.

[239] This is part of the legacy of Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–88 (1951). *See also* American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 522–23 (1981); NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 782 (1979); Beth Israel Hospital

Quite apart from the recent controversies over whether or not governmental actions are subject to implicit financial cost-benefit analysis[240]—a proposition that would allow courts to intrude on the intimate details of cost-accounting that they probably have been wise to avoid[241]—all judicial reviews of the rationality of governmental actions thus involve, at least implicitly, an overall conceptual inquiry into the decisions' pluses and minuses.

b. Alternatives, and the Riddle of Less Drastic Means

This basic clarification of rationality analysis ultimately identifies a further element implicit in cost-benefit logic, but one less widely noted. When individual citizens decide what kind of car to buy, the question is not isolated on one option, for example, "shall I buy a new red Ford Sabretooth, or nothing?" Rather, cost-benefit balancing by rational individuals takes place in a *context*: it includes consideration of the costs and benefits of alternative options as well. In the automobile example, for instance, a consumer will usually consider other brands, other models, new or used, as well as the option of postponing the purchase, or of doing nothing.

Governmental decisions are no different. A rational agency decision on auto passenger safety logically will include consideration of the overall costs and benefits of all available, practical alternatives. If it does *not*, courts can properly criticize the agency decision as irrational, especially where it imposes heavy burdens on private interests.[242] Moreover, an agency decision to impose particular burdens on an individual, when the same legislative purposes could be as well served by "less-drastic-means," may be scrutinized by the

---

v. NLRB, 437 U.S. 483, 501 (1978); Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974), *reh'g denied*, 420 U.S. 956 (1975).

[240] Justice Powell would have so held in the benzene case, Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 664–71 (1980) (Powell, J., dissenting), but the Court has not followed his lead. ATMI v. Donovan, 452 U.S. 490 (1981). *See* Comment, *An Inherent Role for Cost-Benefit Analysis in Judicial Review of Agency Decisions: A New Perspective on OSHA Rulemaking*, 10 B.C. ENVTL. AFF. L. REV. 365 (1982).

[241] *See supra* note 27.

[242] Unless, of course, the agency has been legislatively restricted in the range of options it is permitted to consider. In *State Farm*, for example, if Congress had said "seatbelt systems only," it would have limited the alternatives comparison to seatbelts, at least so long as a court could not say the legislative constraint was itself irrational. *See State Farm*, 463 U.S. 29. This is where the difference between agency and legislature is likely to be most relevant; the elements of judicial rationality review may be the same, but a reviewing court will allow a legislature a broader leeway of purposes, goals, or normative considerations.

courts and overturned if, on cost-benefit balance, the failure to use less drastic means cannot be rationally supported.[243]

Even simple governmental decisions with narrowly restricted terms—"do we build Bridge X or not?"—contain several layers of alternatives analysis as well: do we build it as a truss bridge as designed, or as a suspension bridge, or a draw bridge; do we not build it? Each of these questions involves a comparative cost-benefit question, balancing facts that support the proposal and those that detract from it in the context of reasonably available, alternative options.

The riddle of less-drastic-means analysis is that the concept has developed significant recognition in several areas of the law, without attracting much scholarly comment upon its generic utility. Less-drastic-means language regularly occurs in several areas of constitutional law. When governmental actions have weighed heavily on fundamental rights, as did the state restriction on voting rights struck down in *Dunn v. Blumstein*, the resulting higher scrutiny judicial review has included analysis of less drastic means.[244] The concept appears in equal protection cases, too. Some classifications are "rational" in the sense that they accomplish their proper public purposes, for example, but can be successfully attacked as over-inclusive because a less-drastic classification would accomplish the purpose equally well.[245]

Another line of least-drastic-means case law derives from the Court's 1894 *Lawton v. Steele* decision noted earlier, upholding a state conservation agency's destruction of illegal nets to stop poaching.[246] The *Lawton* Court based its decision on the judicial test of whether "the means are *reasonably necessary* for the accomplishment of the [public] purpose and not unduly offensive upon individuals."[247] This test specifically accepted judicial review of "necessity," a review that would appear to require consideration of governmental alternatives,[248] and did so in a balance between particular individual burdens and governmental efficiency. *Lawton*'s test continues to

---

[243] *See infra* notes 252–54 and accompanying text.

[244] 405 U.S. 330 (1972).

[245] *See infra* notes 252–54.

[246] 152 U.S. 133 (1894).

[247] *Id.* at 137 (emphasis added); *see also* Libertarian Party of Florida v. Florida, 710 F.2d 790 (11th Cir.), *cert. denied*, 469 U.S. 831 (1983); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); United States v. Mason, 523 F.2d 1122 (D.C. Cir. 1975).

[248] Necessity is another problematic word, considered at length *supra* at note 121 and accompanying text.

appear in both state and federal judicial review cases[249] though its implications for active rationality review are generally unremarked.

The wonder is that this relatively simple judicial act—the consideration of governmental decisions, deferentially, in the context of the realistic, available governmental options—has not been explicitly undertaken in a wider range of cases. In practice it surely occurs, in nonexplicit terms. For example, in *State Farm Mutual* the Court insisted on reviewing the Reagan Administration's seatbelt rules in terms of the alternative, passive restraint protective requirements available.[250] Moreover, the extrapolation of equal protection review techniques to due process reviews, in effect reviewing "classification" categories of one individual at a time, is not a great leap. Nevertheless, perhaps because it raises the troubling specter of reviewing subjective governmental judgments of "necessity," as noted in the eminent domain setting,[251] the concept appears only occasionally in constitutional reviews in state courts, and even more rarely in federal courts.

In one area of judicial review of administrative decisions, however, the less-drastic-means test has flourished as an integral part of basic arbitrary and capricious analysis. In a long-running series of FTC cases, the courts have developed a less-drastic-means formulation for testing the rationality of administrative decisions. When a product's name has falsely implied that it contains desirable ingredients (the name "Alpacuna" for cloth made of cotton and wool, but containing no alpaca and no vicuna)[252] or when a company name itself has been misleading (The Royal Milling Company did not mill anything),[253] the FTC has ordered changes in the corporate or product name. The courts, however, have regularly reviewed and occasionally vacated these FTC orders on less-drastic-means grounds. The theory of those court decisions was either the substantive imperative that, in light of the burdens on regulated parties, agencies *must*

---

[249] Goldblatt v. Hempstead, 369 U.S. 590, 597 (1957); Air Terminal Services v. United States, 330 F.2d 974, 981 (Ct. Cl.), *cert. denied*, 379 U.S. 829 (1964); Gambone v. Commonwealth, 375 Pa. 547, 551–52, 101 A.2d 634, 637 (1954) ("The question whether any particular statutory provision is . . . related to the public good and . . . reasonable in the means it prescribes . . . is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts." (footnote omitted)); Commonwealth v. Barnes & Tucker Coal Co., 472 Pa. 115, 128, 371 A.2d 461, 467 (1977), *cert. denied*, 434 U.S. 807 (1978).

[250] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48–49, (1983).

[251] *See supra* notes 121–34 and accompanying text.

[252] Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).

[253] FTC v. Royal Milling Co., 288 U.S. 212, 214–15 (1933).

adopt the available less-drastic remedies,[254] or, more subtly, that agencies must explain adequately why they did not order the lesser burden.[255]

These less-drastic-means decisions and others like them do not appear to be based upon any statute but are a gloss on the basic concept of administrative rationality, sounding in due process.[256] The fundamental assumption is that, when the consequences of an agency remedy will weigh heavily on private (particularly corporate) property, a rational agency must choose the alternative that is least burdensome as well as effective for accomplishment of its purpose, or explain sufficiently why it did not do so.

This existing experience with explicit less-drastic-means judicial review suggests several conclusions. First, such reviews are feasible, despite the undoubted demands of deference. Second, the extension of typical means-end reviews into the consideration of alternatives does not represent a quantum leap into the unknown. (The courts reviewing FTC orders do not even seem to realize the expanded nature of their reviews.) Insofar as it accords with common sense, moreover, consideration of the contextual reality of available alternatives is desirable in those cases in which more narrow means-end inquiries miss important points. The courts' exercise of less-drastic-means contextual reviews in such cases appears to be broadly accepted by scholars and courts alike, with criticism reserved for disagreements over particular applications.[257] Finally, the fact that courts do undertake implicit less-drastic-means scrutiny in some cases[258] argues for further recognition and acceptance of the propriety of this form of rationality analysis.

D. Substantive Due Process: Caging the Lochner *Monster*

1. *Lochner*

Substantive due process, especially its economic version, has a bad name, well-earned by the protracted run of judicial bad judg-

---

[254] *See* Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), *cert. denied*, 435 U.S. 950 (1977).

[255] *Jacob Siegel Co.*, 327 U.S. 608 (1946). In this case, the agency got the message, and reversed its challenged decision. *Id.* at 613.

[256] The less-drastic-means FTC cases cite no statutory basis for the fundamental proposition. *See, e.g., Royal Milling*, 288 U.S. at 217.

[257] *See* Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Wormuth & Miskin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

[258] Eisenstadt v. Baird, 405 U.S. 438 (1972); Schneider v. Smith, 390 U.S. 17, 24 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963).

ment associated with it earlier in this century. The substantive means-end review discussed in this Article certainly touches upon a suspect territory of substantive due process. If the "arbitrary and capricious" test is not just a statutory creation, and is not restricted to mere procedural applications, then it is a constitutional concept sounding in substantive due process. Despite the anathema pronounced upon substantive due process by succeeding generations of courts and scholars, however, such process fulfills a valuable fundamental role in our system, and, more or less surreptitiously and consistently, continues to play it.[259] A clarified analysis of what it was all about can serve to narrow the criticisms of substantive due process review and help it emerge circumspectly from the closet.

The notorious *Lochner* decision is perhaps the classic substantive due process case, overturning New York's protective restriction of working hours for bakery workers, ostensibly on behalf of the workers' right to agree to be exploited.[260] The *Lochner* opinion clearly had aspects of substantive means-end review. The Court spent time examining the degree to which work restrictions related to public health, concluding that "the act must have a more direct relation, as a means to an end,"[261] a phrasing that clearly questioned whether the act plausibly served its purpose.

But the *Lochner* decision contained much more, in such a motley array of issues that it would be ill-advised for scholars to pin the results of its holding on simple means-end review. Moreover, the opinion is clouded by a double focus, implicitly treating employers' rights and workers' rights as parallel, and relying on the constitutional right of contract as well as due process.[262] The major ambi-

---

[259] This is not a novel perception. *See* Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (1982); Karlin, *Substantive Due Process: A Doctrine for Regulatory Control*, 13 SW. U.L. REV. 479 (1983); P. BREST, *supra* note 22, at 657–717.

[260] Lochner v. New York, 198 U.S. 45 (1905). Probably only Dred Scott v. Sanford, 60 U.S. 393 (1857), and Korematsu v. United States, 323 U.S. 214, *reh'g denied*, 324 U.S. 385 (1944), have enjoyed such persistent infamy among members of the legal profession. As of 1984, some form of the word "Lochner" occurred in 274 cases, federal and state, a remarkable legacy for an overruled and discredited opinion!

[261] 198 U.S. 45, 57 (1905).

[262] *Id.* at 53, 57.

> The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment. . . .

Id. at 53. As with the classic case of Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), which also involved a contracts theory as support for the Court's finding of unconstitutionality, the substantive due process theory in *Lochner* has tended to eclipse the contract claim in the

guity, however, lies in determining what branch of substantive due process was actually applied, because, if one makes categorical distinctions between the purpose and means-end inquiries, it is the *former* that receives most of the Court's wrath, not the latter.

The legislature's "end must itself be appropriate and legitimate," Justice Peckham wrote.[263] New York's stated purpose in passing the regulation was health, a valid purpose. In arriving at the conclusion that the act was unconstitutional, however, Peckham made it clear that the justices thought the legislature was, as he said, up to something.[264] The state's arguments gave rise "to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare," making it appear to the Court "that the real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business . . . ."[265]

In fact, it was the suspicious ideological economic purposes that lay latent in such governmental activism, not the logic of whether the regulation actually achieved its avowed purposes, that inspired the Court's antagonistic reaction. The decision also contained hints of other purpose problems, including the permissibility of protecting workers against their own free choice.[266] The opinion continued beyond purpose in means-end terms to say that the Court doubted that the act was substantially related to health,[267] but the Court's ex-

---

subsequent assessments of both courts and scholars. As a matter of more current interest, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the contract clause's re-emergence included a Supreme Court test of whether the challenged governmental action was "necessary." *Allied Structural Steel*, 438 U.S. at 247; *cf. supra* notes 121–34 and accompanying text.

[263] *Lochner*, 198 U.S. at 57.

[264] *Id.*

[265] *Id.* at 63–64. The opinion continued on, expressing further doubt about the substantial relationship. "[F]rom the character of the law and the subject upon which it legislates, it is apparent that the public health or morals bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed . . . and not from [its] proclaimed purpose." *Id.*

[266]

> The mandate of the statute that "no employee" shall be required or permitted to work is the substantial equivalent of an enactment that "no employee shall contract or agree to work" more than ten hours per day . . . . The employee may desire to earn the extra money . . . [and] this statute forbids the employer from permitting the employee to earn it.

Id. at 52–53; *cf. supra* note 262.

[267]

> The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty

pressed concern about the legislature's purposes was clearly important to the *Lochner* case's outcome. Thus, although subsequent generations have rejected *Lochner* and its ilk, the character of the backlash has similarly been too blunt and unspecific in response to the blunt force of that Court's passion, equating substantive due process with the whole panopoly of reactionary arguments and consequences.

Several major analytical distinctions can be made within *Lochner*. Most importantly, the *Lochner* Court's scrutiny of purpose was a separate inquiry from its means-end scrutiny. As to the first inquiry, it surely was legitimate that the Court considered whether the state had a proper public purpose. The part of *Lochner* that has become ill-regarded by our legal system, at least until recently, is the *Lochner* Court's specific view that government's regulatory planning purpose is an illegitimate component of general welfare.[268] If this approach is to be characterized as a means-end review, however—as a latent holding that governmental regulatory planning based on economic considerations was in general neither a rational nor permissible means to the end of health and welfare—that specific argument has long since been overturned.[269] Indeed, the *Lochner* majority's discussions on the subject of means-end relationship support the interpretation that the Court held a strong fundamental skepticism about the legitimacy of regulation itself.

The *Lochner* decision has thus justifiably been subjected to the commentators' scathing negative reaction. The fault should not be attributed to the alleged illegitimacy of all substantive means-end review, however. Rather, it lies in the highhanded, almost total lack

---

> hours a week . . . . The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid.

Id. at 57.

[268] In comparing *Lochner* with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a minimum wage law), Professor Tribe writes:

> [If *Lochner* was wrong, and *West Coast Hotel* was right], the reason can *only* be that, in twentieth century America, minimum wage laws, as a substantive matter, are *not* intrusions upon human freedom in any constitutionally meaningful sense, but are instead entirely reasonable and just ways of attempting to combat economic subjugation and human domination.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 585 (2d ed. 1988).

[269] *Euclid* seems to have been the Court's first acceptance of comprehensive planning. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). "Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations . . . . [The scope of application] of constitutional guarantees . . . must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." *Id.* at 387.

of deference the *Lochner* Court exhibited in its means-end inquiry. In virtually taking over the legislature's decision, the Court effectively eliminated any presumption of validity. This tilt can probably be best explained by the Court's elemental suspicion of the government's purposes, equating the natural course of business decisions as an entrepreneurial "fundamental right,"[270] a right the Court considered basic to the structural health of the American polity.

From this perspective, the means-end review of the *Lochner* Court appears to have been approached in exceedingly rigorous, almost unachievable terms, with extreme results. But if the Court had reviewed the health purpose and found that the regulation *did* reasonably relate to that purpose (as in fact it had done in *Radice v.New York* and other economic regulation cases),[271] generations of commentators would not have condemned the *Lochner* result, though analytically the Court would just as surely have been pursuing substantive due process review. The commentators confuse the particular results reached by the *Lochner* Court in applying the test with the terms of the test itself.[272]

2. Substantive Due Process in Spite of *Lochner*'s Backlash

It is hardly new to assert that "generic" substantive due process never disappeared from the courts.[273] Because of the profession's aversions to the excesses of the old "economic" substantive due process cases, however, it is rarer to find judges overtly identifying

---

[270] *Lochner*, 198 U.S. at 53; *cf.* Roe v. Wade, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973); Dee v. Bolton, 410 U.S. 179, *reh'g denied*, 410 U.S. 959 (1973). Addressing *Lochner*, Professor Tribe writes that

> What was wrong was simply that, as a picture of freedom in industrial society, the one painted by the Justices badly distorted the character and needs of the human condition and the reality of the economic situation . . . . [But] *there is no escape* from the difficult task of painting a better—a morally and economically truer—picture . . . .

L. TRIBE, *supra* note 268, at 455 n.37.

[271] *See, e.g.*, Radice v. New York, 264 U.S. 292, 294–95 (1924) (upholding statute prohibiting the employment of women in restaurants during certain hours); Baltimore & Ohio R.R. v. Interstate Commerce Comm'n, 221 U.S. 612, 619 (1911) (upholding limitations on the working hours of railroad employees); Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (upholding statute that limited the workday of factory women); Bunting v. Oregon, 243 U.S. 426, 438-39 (1917) (sustaining ten-hour maximum workday for male factory employees).

[272] The Supreme Court's confusing agglomeration of motives, analyses, and rhetoric in *Lochner* was echoed elsewhere in the *Lochner*-era due process cases. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[273] Michelman, *supra* note 22, at 499; *see also* articles cited in *supra* note 259.

their inquiries as substantive due process.[274] Nevertheless, although active judicial use of the term "substantive due process" fell off drastically after *Nebbia* and *West Coast Hotel*, the practical reality has continued.[275]

Administrative law decisions again offer a useful analytical perspective in defining the constitutional foundation of substantive due process. Between the 1937 Supreme Court's "switch in time that saved nine," abandoning the *Lochner* line among others, and 1946 when the Administrative Procedure Act (APA) was promulgated by a virtually unanimous Congress, substantive judicial review of agency actions *continued unabated*, despite that fact that there was no direct general statutory authority for it.[276] As the 1946 Attorney General's Manual on the APA noted, "[c]ourts having jurisdiction have always exercised the power in appropriate cases to set aside agency action which they found to be . . . 'arbitrary, capricious [or] an abuse of discretion.'"[277] The legal basis of such review analytically had to be substantive due process.

A further coda on *Lochner*'s backlash is that times do change. *Lochner*'s reasoning harkened back to the era of American political theory when the unencumbered marketplace was the primary engine

---

[274] Instead, the modern tendency is for the Court to present its review within the framework of a "fundamental right" deriving from the so-called penumbras of the Bill of Rights. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965). In *Lochner*, the substantive due process portion of the opinion concerned the "overbreadth" argument: the mere fact that a bakery may be somewhat unhealthy does not justify a sweeping interference with liberty. Lochner v. New York, 198 U.S. 45, 59 (1905). As it compared bakeries to other *unregulated* businesses, the Court made an equal protection argument. *Id.* As Professor Bice states the distinction, a citizen's due process claim is that "[t]he State may not treat me the same as it does him, for we are different," while that citizen's equal protection claim is "the State may not treat me differently, for we are the same." Bice, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 832–33 (1978). Courts, however, are not always so clear in distinguishing between the two concepts, often confusing the "overbreadth" due process concept with equal protection.

[275] Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See, e.g.*, State Ex. Rel. Anderson v. Brand, 303 U.S. 95, *reh'g denied*, 303 U.S. 667 (1938) (striking down an Indiana law repealing teacher tenure rights); Wood v. Lovett, 313 U.S. 362 (1941) (immunizing landowner from repeal of statute curing tax sale irregularities).

[276] *See* Bridges v. Wixon, 326 U.S. 135 (1945); Long Island Water Corp. v. Public Serv. Comm'n, 23 F. Supp. 834 (S.D.N.Y. 1938); David L. Moss Co. v. United States, 103 F.2d 395 (C.C.P.A. 1939); Estep v. United States, 327 U.S. 114 (1946); Markall v. Bowles, 58 F. Supp. 463 (N.D. Cal. 1945); Marburg v. Cole, 175 Misc. 308, 23 N.Y.S.2d 501 (1940). The APA, 5 U.S.C. §§ 701–706 (1982), was passed in June 1946. Section 10 of the APA provides for judicial review of administration decisions, including both "arbitrary [and] capricious, . . . abuse of discretion" and "substantial evidence" as statutory tests. 5 U.S.C. § 706(2)(A), (E) (1982).

[277] Attorney General's Manual on the Administrative Procedure Act 108 (U.S. Gov't Printing Office 1947).

of national endeavor. The backlash against *Lochner* developed in the era when government came to be recognized as a legitimate participant and counterweight to the excesses of the market. As Professor Stewart's classic historical overview illustrates,[278] however, America has progressed beyond a simple bipolar system of governmental power versus business power. Though the old tensions remain to some degree, to a greater degree business and government have worked out a fairly consistent system of accommodating one another (thereby creating the "Establishment" discovered by the Woodstock generation), and the legal system has been pushed to allow pluralistic intervention by third-party "outsiders": consumers, environmentalists, disgruntled veterans, safety nuts, and so on.[279]

E. Defining the Basic Governmental "Purpose"

A process of defining "legislative purpose" or "legitimate ends" has been the starting point for judicial reviews of governmental action at least since *McCulloch v. Maryland*.[280] Regulatory objectives must satisfy constitutional requirements in terms of their own validity as well as their relationship to other merits on review.[281]

Justice Frankfurter established the proposition that the search for such objectives is properly a problem of statutory interpretation.[282] Thus, according to Frankfurter, it is the job of the Court to "'proliferat[e] a purpose,'" in part through a thorough investigation of "the demonstrable forces" that produced it.[283] These "demonstrable

---

[278] Stewart, *Reformation, supra* note 47; *see also* Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981).

[279] Notable examples of "third party" challenges that are generally recognized as legitimate, though initially regarded as maverick efforts, include the SST supersonic transport, now regarded as a narrowly-avoided economic fiasco; the Trans-Alaska pipeline, which was forced into vastly improved technology and design; the identification of health hazards of cigarette smoking to smokers and non-smokers; Rachel Carson's identification of the widespread consequences of chemical contamination of the physical environment; nuclear issues; and citizen attempts to halt the Teton Dam on safety grounds, etc. Citizens' public interest litigation is now a widespread and established part of the judicial docket in both state and federal courts.

[280] 17 U.S. (4 Wheat.) 316 (1819). "Let the end be legitimate, let it be within the scope of the constitution, and all means . . . plainly adapted to that end . . . are constitutional." *Id.* at 421. This statement incorporates the essential elements of substantive judicial review of authority, of proper public purpose, and of a deferential but meaningful consideration whether chosen means are "plainly" related to accomplishing ends.

[281] Cantwell v. United States, 310 U.S. 296, 304 (1940); McQuoid v. Smith, 556 F.2d 595, 599 (1st Cir. 1977).

[282] Attributed to Justice Holmes, without citation, in Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947).

[283] Universal Camera Corp. v. NLRB, 340 U.S. 474, 481 (1951) (quoting Brooklyn Nat'l Corp. v. Commissioner, 157 F.2d 450, 451 (2d Cir.), *cert. denied*, 329 U.S. 733 (1946)).

forces," however, are not the same thing as the subjective intent of legislators. There is a major difference between legislative purpose and legislative intent. Attempts to divine the subjective intentions of the collective legislative mind represented by "legislative intent" may be difficult,[284] and may well miss the point. The point is not what various individual legislators sought to accomplish through the legislation,[285] and even less how a majority of those legislators might decide a specific case today if they were still alive,[286] but what the central goal of the legislation was, the "raison d'etre" objectives that can be discerned on its face.[287]

The interpretation process usually is based upon express terms in the statute itself, in preamble or text, but may also be declared by the state through its officers and advocates. With a few dramatic exceptions,[288] the courts will not step in and create a validating purpose where none has been expressed by the legislature.[289]

---

[284] As Max Radin observed in his classic article on statutory interpretation:

> That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small . . . . Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men . . . . It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.

Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930).

[285] For a bemusing case where a court heard conflicting testimony from legislators as to what they really had meant when they voted for a bill, see Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal.3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

[286] This inquiry crosses the lines between the role of courts and agencies, on one hand, and legislatures, on the other. A legislature ends, as a legal entity, on the day it adjourns, leaving its statutory acts to fare on their own merits in courts and agencies until properly amended or repealed. *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1144–47, 1243–69 (tent. draft 1958).

[287] "This Court need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

[288] *See, e.g.*, Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, *reh'g denied*, 331 U.S. 864 (1947).

[289] Bice, *supra* note 22, at 30. In his dissenting opinion in Schweiker v. Wilson, 450 U.S. 221 (1981), Justice Powell wrote:

> Our democratic system requires that legislation intended to serve a discernable purpose receive the most respectful deference . . . . Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence. In my view, the Court should receive with some skep-

There is, however, a further problem in defining legislative purpose: at what level of generality must it be defined? The Court in *Williamson v. Lee Optical Co.* upheld a statute prohibiting opticians from fitting eyeglasses, based upon a statutory purpose of "promoting health and safety."[290] The Court would have had a much harder time doing so if the statute had straightforwardly stated that "the purpose of this legislation is to protect optometrists against competition."

The definition of purpose defines the "turf" upon which the struggle of substantive means-end review will be undertaken. *Williamson* is an example of the Supreme Court upholding a regulation by accepting a definition of purpose posited at a very high level of abstraction. Definitional quandaries arise, as Dean Brest has noted, in the context of analyzing the level of generality at which the search for purpose is undertaken.[291] A regulation prohibiting the throwing of soda cans in streams, for example, could be justified by the following objectives: 1) to keep soda cans out of streams; 2) to reduce litter and water pollution; 3) to protect the environment; or 4) to promote the general welfare.

Level one is, of course, "self-validating" in that it is tautological, and Brest warns that any regulation can be validated at this level of perfect congruence between ends and means.[292] Level four is what Ely refers to as an "umbrella goal," and its broad, indiscriminate terms also serve to insulate what he calls "discretionary choices," legislative determinations as to purpose that cannot be effectively reviewed by the courts.[293] Ely further warns us about the use of "malleable goals": "An infinitely expandable set of subgoals, one to

---

> ticism *post-hoc* hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a "fair and substantial relation" to the asserted purpose.

Id. at 244–45 (Powell, J., dissenting).

Powell went on to argue that, when a statute's purpose is unclear, a slightly higher standard of review would provide a meaningful litmus test as to the constitutionality of the statute with respect to goals, and would result in a review that would be more than a "mere tautological recognition of the fact that Congress did what it intended to do." *Id.* at 245. In a sense, Powell is simply suggesting that the Court return to its time-honored task of interpreting statutes; that judges should be above accepting mere conclusory, adversarial, after-the-fact postulations as to the nature and legitimacy of a statutory purpose, and should not lightly substitute them for the reasoned art of statutory interpretation.

[290] 348 U.S. 483, 486–87, *reh'g denied*, 349 U.S. 925 (1955).

[291] P. BREST, *supra* note 22, at 560–61.

[292] *Id.*

[293] Ely, *supra* note 22, at 1239–40.

fit every choice the political branches will make, is more realistically viewed as one umbrella goal: the promotion of the general welfare. The relations between such a goal and various legislative choices is not amenable to evaluation in terms of rationality."[294] Thus, "expandable" or "malleable" goals can too easily justify judges' avoidance of tough cases.

Despite the difficulties of subjectivity, substantive review of legislative purpose occurs regularly in current jurisprudence, and usually falls more fittingly between the two extremes of tautology, on the one hand, and all-inclusive, umbrella-goal formulations, on the other. Meaningful judicial review seems to require a reasoned determination of a government's purpose in acting, so as to provide some initial reference points or "intelligible principle" to guide judicial review.[295]

The process of defining governmental objectives, and thereafter testing whether they are reasonably related to regulatory measures, has been criticized by some as a "divide and conquer" dissection of a statute.[296] For such critics, the Court's process in *Shapiro v. Thompson*,[297] striking down a one-year state welfare residency requirement by scrutinizing each of seven purported purposes, illustrated this fear. By isolating and analyzing each possible public purpose in turn, the Court was able to determine that none was in fact rationally served by the statute at hand. One critic has argued that, although each purpose individually may have failed to withstand scrutiny, together they should have been sustained on the basis of some penumbral critical mass: "It is only in the context of the full statutory scheme that full meaning can be given to each legislative objective."[298]

On its face, this argument invites far more deference on the part of reviewing courts, but still concedes the requirement that regulatory objectives must find support in the regulatory scheme. In either

---

[294] *Id.*

[295] *Cf.* the delegation cases, beginning with J.W. Hampton, Jr. Co. v. United States, 276 U.S. 394 (1928), which allowed courts to uphold delegations of legislative power if they and the agencies had "an intelligible principle" from congressional enactments to guide them.

[296] Note, *supra* note 22, at 127.

[297] Shapiro v. Thompson, 394 U.S. 618, 629–34 (1969). The Court examined and rejected each of seven separate definitions of statutory purpose for a state statute restricting residence definitions for welfare applicants. By considering each goal and sub-goal separately, the Court was able to narrow the question whether that purpose had a rational basis, and strike the statute down. The Court also matter-of-factly included a "necessity" test in reviewing the latter four sub-goals. *Id.*

[298] *See* Note, *supra* note 22, at 127.

case, therefore, the process of defining a purpose and seeking its support in the merits of governmental determinations remains a basic and indispensable part of the judicial review process.

F. The Rationality Review Debate

The continuing debate over a revived rationality review can be traced back to a spirited series of scholarly jousts between Professors Raoul Berger and K.C. Davis in the mid-1960s.[299] Davis argued that some areas of administrative arbitrariness and abuse of power were unreviewable by the judicial branch under the terms of the APA; Berger asserted a broad constitutional presumption for reviewability arguing that "grave constitutional doubts would be raised by the . . . proposal selectively to shield arbitrary action from review."[300] Behind their acidic discussion of whether or not discretionary acts of administrative agencies were largely exempt from judicial review for arbitrariness loomed the constitutional due process doubts attached to such unreviewability.[301]

The debate became focused on arbitrary legislative acts in 1972 by Gerald Gunther's assertion that courts could and should enforce the principle (which he identified as a *constitutional* norm) that legislative means must substantially further legislative ends.[302] Subsequent commentaries by Tribe, Brest, Bennett, Michelman, and Bice, among others, have argued for a resurgent means-end substantive review.[303] In contrast, Professor Leedes and Judge Linde

---

[299] *See, e.g.*, Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (1958 & Supp. 1976) [hereinafter K. DAVIS, TREATISE]; Berger, *supra* note 15; Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' 'Final Word'*, 114 U. PA. L. REV. 816 (1966); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966).

[300] Berger, *supra* note 15, at 785.

[301] As Berger noted: "The due process test of a statute . . . is whether it is 'unreasonable, arbitrary or capricious.'" *Id.* (quoting Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 410 (1932) (Brandeis, J., dissenting)). "Arbitrary *application* of a statute is as obnoxious . . . as is a statute that is arbitrary in terms. What is denied to the legislative-principle must be withheld from the administrative-agent. '[T]here is no place in our constitutional system . . . for the exercise of arbitrary power.'" *Id.* (quoting Garfield v. Goldsby, 211 U.S. 249, 262 (1908)).

[302] Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972).

[303] L. TRIBE, *supra* note 268, § 8-7, at 585; P. BREST, *supra* note 22, at 661–83; Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Michelman, *supra* note 22; Bice, *supra* note 22. Without advocating direct cost-benefit review process, Professor Bice argues that courts should insist on a

have argued that at least the means-end, substantive due process inquiry should remain buried.[304]

It would be presumptuous to attempt to summarize the intricacies of a debate so marked in quality, depth, and volume, but some generalizations emerge: 1) the technical demands of rationality review are not daunting—courts know how to review substantive means-end relationships because they currently do so in equal protection and other cases, and the process could easily be extended to due process cases generally;[305] 2) the job of substantive review requires the courts to engage in a subjective weighing of minimum rationality that is based on a careful process of defining degrees of deference; and 3) the decision whether or not to engage in substantive review reflects judges' basic philosophical conceptions of the role of courts, of checks and balances, of the nature of republican government, and of the social contract. Thus, lying behind substantive judicial review is a major philosophical choice that judges make directly or by default when they take on or dodge substantive review.

1. Means-end Review in Contemporary Practice

The equal protection cases offer the clearest current examples of how substantive rationality review is a practical process, a recurring illustration of a judicial balance between avowed means-end review and deference. In the past several decades, the Supreme Court has actively engaged in substantive review of challenged legislative classifications in what has been called variously a two- or three-tier system of scrutiny, but which analytically is simply the same means-end test applied with differing degrees of deference.

For example, in *Cleveland Board of Education v. LaFleur*,[306] a "middle level scrutiny" case, the Court gave an unusually articulated analysis in striking down portions of two local school board regulations restricting employment of pregnant women. Consider the rea-

---

critical modicum of "fundamental rationality." *Id.* at 53–56. It is difficult to avoid the conclusion that this too would involve a means-end, cost-benefit review.

[304] Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981); Linde, *supra* note 22, at 207–22; *see also* J. CHOPER, THE SUPREME COURT AND THE POLITICAL BRANCHES 59 (1980).

[305] Indeed, the tests employed in equal protection and due process cases are very similar. Both kinds of cases employ the "necessary to achieve a compelling state interest" test in fundamental rights adjudication, and the "rationally related to a legitimate state interest" test for other cases.

[306] 414 U.S. 632 (1974).

soning: the Court upheld those challenged provisions that required pregnant women to give their employers notice of their pregnancies, on grounds that the purpose of efficient school planning was proper, the notice requirement directly served that purpose, and the burden on women teachers was minimal. The Court applied the same analytical elements, however, to strike down the provisions automatically terminating employment at four months of pregnancy, examining three purposes claimed by counsel for the state government.[307] If the purpose was continuity of instruction, a proper purpose, the four-month termination was not rationally related, the Court said, because it did not *per se* enhance the "orderly transition between the teachers and a substitute,"[308] and might actually undercut continuity, for example, if the school year ended in a teacher's fifth or sixth month of pregnancy.

This case provides a simple example of factual implausibility analysis: no static termination date directly served the continuity purpose. If the purpose was to screen out physically incapable teachers (a proper purpose), it was not rationally related because the irrebuttable presumption applied "even when the medical evidence . . . might be wholly to the contrary."[309] This case also provided an example of cost-benefit analysis on the over-inclusiveness issue. There clearly is *some* relationship in some cases between being more than four months pregnant and working ability, but the Court refused to allow that broad generalization to hold in light of the heavy economic and social burdens imposed by such terminations of employment.[310] If the burdens had been trivial, the Court might well have permitted such over-inclusiveness for the sake of achieving the purpose. In fact, it suggested just that in a footnote, saying that a rule automatically terminating employment in the last few weeks might be a valid balance even without any individualized opportunity for medical screening.[311]

Similarly, the *LaFleur* Court rejected the third proffered purpose, administrative efficiency, which the Court undermined by an implicit benefit-burden test. Though administrative efficiency was considered

---

[307] The school board in *Cleveland Bd. of Ed. v. LaFleur* attempted to justify their regulation in relation to two "overlapping" purposes: continuity of instruction and protection of the health of mother and child. *Id.* at 640–41. The Board also referred to the related goal of keeping physically unfit teachers out of the classroom. *Id.* at 643.

[308] *Id.* at 642 (quoting Green v. Waterford Bd. of Educ., 473 F.2d 629, 635 (2d Cir. 1973)).

[309] *Id.* at 644.

[310] *Id.*

[311] *Id.* at 647 n.13.

a proper purpose, and was rationally served by the predictability of the four-month cutoff, it was not a sufficiently important purpose in light of the grievous burden imposed upon regulated individuals. According to the Court, "[t]he Constitution recognizes higher values than speed and efficiency."[312]

These analytical elements can be discerned throughout the equal protection cases, from cases at the strictest level of scrutiny to the lowest basic level of arbitrariness review:[313] a process of judicial consideration of legislative purpose, the rationality of means to ends, and some judgment of benefit-burden proportionality resembling a least-drastic-means analysis. The major analytical demands of this approach are defining and establishing which legislative purposes are relevant to an action, and how the means-end relationship is to be weighed in benefit-burden terms beyond basic factual plausibility. On one hand, those commentators who criticize the Court's willingness to examine each alleged purpose as a divide and conquer process,[314] urge the Court to engage in a less critical, overall lumping-together review, inviting judicial gut reactions and, ultimately, uncritical deference.[315] On the other hand, there are justices who accept

---

[312] *Id.* at 646 (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1971)); *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 489, *reh'g denied*, 349 U.S. 925 (1955) (the evils sought to be corrected "may be of different dimensions and proportions, requiring different remedies").

Other portions of the *LaFleur* opinion, on post-pregnancy return rules, were similarly decided. *LaFleur*, 414 U.S. at 649–51.

[313] This holds true even at the lowest level of review. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). "At the minimum level, however, the Court 'consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.'" *Id.* at 439 (Blackmun, J., concurring) (quoting Schweiker v. Wilson, 450 U.S. 221, 230 (1981)). In *Zimmerman Brush*, Justice Blackmun filed an opinion concurring with his own majority opinion, in a case where six of the justices supported the assertion that the lowest level of permissible equal protection had been violated. That case apparently likewise involved a proportionality balance.

[314] Note, *supra* note 22, at 127. Another example of the divide and conquer process of testing legislative purpose is Eisenstadt v. Baird, 405 U.S. 438 (1972), in which the Supreme Court invalidated a Massachusetts statute making it a felony for anyone but a physician or registered pharmacist to provide contraceptives to unmarried persons. The *Eisenstadt* Court considered three purposes: discouragement of premarital sex; promotion of health and safety; and the prohibition of contraception. *Eisenstadt*, 405 U.S. at 448–53. The Court found the first two goals not to be rationally advanced by the statute, and the third to be impermissible. *Id.* The Court's approach is criticized in the Yale note. *See generally* Note, *supra* note 22.

[315] Leedes, *supra* note 304, at 661. This commentator suggests that:

> Because the Court indicates that . . . pure favoritism . . . [is] always prohibited . . . legislatures conceal their true aims with respectable figleaves, government attorneys often lack candor, and courts often scan the universe for some hypothetical end the legislature may never have considered . . . [B]ut a court obviously deceives itself and the public when it holds that the health, safety, and general welfare are intended to be furthered by a statute that was actually enacted for reasons unrelated to those

the need for specific, reviewable purposes, but are not only willing to accept the *post hoc* rationalizations of government litigators as to probable purposes, but also are ready to hypothesize their own formulations of what purposes the legislature might have had in mind.[316]

As Professor Bice notes,[317] this result constitutes an unhelpful tautology: judges analyze the means chosen in order to determine what the purpose probably was, and then turn around and ask whether the purpose was served by those selfsame governmental actions that they had used to define the purpose in the first place. Such an analysis amounts to an impregnable formula for dismissing all such challenges of governmental actions. The only conceivable findings of irrationality would then have to be based on the judges' retroactive self-criticism of their own logical processes.[318] Rather, it

---

> ends. The mirage is necessary only because the Court's list of permissible ends does not include favoritism . . . . It is my contention that the Court's notions of impermissible ends are too strict, counterproductive, and unnecessary.

Id.

[316] *Id.* As to the "purposes" supplied by litigators, Justice Brennan noted in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (Brennan, J., concurring) (invalidating Iowa's prohibition of 65 foot trailer trucks as a burden on interstate commerce): "My brother Rehnquist claims that the 'argument' that a court should defer to the actual purposes of the lawmakers rather than to the *post hoc* justifications of counsel 'has been consistently rejected by the Court in other contexts.'" *Id.* at 682 n.3 (quoting *id.* at 702 (Rehnquist, J., dissenting)). "Apparently he has overlooked such cases as Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959), . . . Wheeling Steel v. Glander, 337 U.S. 522 (1949) . . . [and] Weinberger v. Weisenfeld, 420 U.S. 636, 648 n.16 (1975) . . . ." *Id.* at 682 n.3.

As to judge-made hypotheses, see Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, *reh'g denied*, 331 U.S. 864 (1947). See also Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), in which Justice Blackmun remarked: "[T]he State's method of furthering [its] purpose—if this was in fact the legislative end—[must not have] so speculative and attenuated a connection to its goal as to amount to arbitrary action. The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Zimmerman Brush*, 455 U.S. at 442 (Blackmun, J., concurring).

[317] Bice, *supra* note 22, at 30.

[318] Indeed, the use of post-hoc determinations of purpose in "minimum rationality" review has come under increasing attack by scholars, who allege that, when courts engage in intensive "ends inquiry," they substitute their own notions of public policy for that of the legislature, and contribute to the impotence of rationality review. According to one commentator:

> There is no way to challenge a classification successfully if a court is ready, willing, and eager to invent a means-end fit, even when the government does not introduce evidence to rebut a challenger's *prima facie* case, files no Brandeis brief, and does not articulate its ends. The Court in such cases shirks its duty by supplying the missing end. [The Court has gone] from the extreme of inconsistent, unprincipled hyperactivism to the extreme of excessive deference. It failed to establish a 'halfway house between the extremes . . . .'

Leedes, *supra* note 304, at 644 (quoting McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 41 (footnote omitted)).

seems the Court has generally settled on a course of reviewing the means-end relationship based upon purposes defined by the words of the statute themselves, defined by authoritative assertions of purpose by responsible state officials, or clearly implied by the structure of the laws in question. This disingenuous *Kotch*ing process[319] fortunately does not appear to be the judicial norm.

Beyond factual implausibility cases where the means just do not suggest the ends, like the four-month cutoff in *LaFleur* that did not logically serve the objective of continuity, lie the more difficult cases of benefit-burden balancing where the choice of means offers some support for a decision, but arguably not enough. The over-inclusiveness, equal protection cases can be understood in this light. For example, when a court finds that a statute prohibiting contraceptives to all users, including married couples, is over-inclusive and overbroad in its attempt to prevent promiscuity,[320] the court analytically is saying that, although the classification serves the purpose by incorporating relevant persons, it is void in light of the heavy burdens imposed on others who are not directly relevant to achieving that purpose, a benefit-burden analysis. If a classification is upheld, it means that only directly relevant persons are included, or that the burden on "innocent" includees is sufficiently slight or the purpose so overwhelmingly important, that the over-breadth is marginal and, on balance, permissible. This type of testing constitutes a straightforward means-end approach to review, and just as clearly incorporates conceptual consideration of benefit-burden relativity.

There is no obvious reason why this longstanding form of logical construct as applied in equal protection cases is not equally applicable in all substantive reviews of governmental actions. The process of defining governmental purpose is no more difficult, the logic of the elements of means-end review is the same, the implicit balancing likewise. An equal protection review of a legislative "classification" comprised of only one individual would be the effective equivalent of substantive due process review of a governmental determination or act.

The major difference between the concept of substantive equal protection review and other substantive due process seems to lie primarily in the fact that the courts have developed a working familiarity with the character of equal protection. In the community

---

[319] *See* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, *reh'g denied*, 331 U.S. 864 (1947).

[320] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

of American jurists, equal protection review has legitimacy because its lineage is well-known, with no black sheep *Lochner*s in the line. But, if the present analysis is correct, the nature and elements of uncontroversially accepted substantive equal protection review are analytically the same as those of substantive due process. Likewise, the vaunted differences between strict scrutiny, middle scrutiny, and low-level rational basis cases evaporate. In each of these settings, as with the standards of review in administrative law, the distinctions seem to come down to distinctions in degrees of deference rather than substance. The debate therefore should focus more on understanding deference. While this observation may clarify the process, however, it does not necessarily make it simple.

2. Degrees of Deference

On one side is the Scylla of the court as "super legislature," with the image of monolithic courts battering down decisions of the other branches of government.[321] On the other is the Charybdis of abdicative judicial deference, the whorl of politics swallowing up the separate role of the courts as long-term defenders of fundamental principles. The perplex of judicial deference posed by *Marbury v. Madison* is that it is difficult to describe the differing degrees of deference, much less to objectify them for practical application. Administrative lawyers have developed an elaborate spectrum of deference tests for judicial review of questions of facts—from trial *de novo* and review *de novo* at the lowest level of deference, up through "clear preponderance," and "substantial evidence," to "arbitrary and capricious," "clearly erroneous," and, finally, nonreviewability—and there is yet another spectrum of deference definitions for questions of law.[322] Nevertheless, in spite of two-score years of APA experi-

---

[321] *See infra* note 351 and accompanying text.

[322] *See* Frankfurter, *supra* note 282; *see also* Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 249–51 (1955). As Professor Gellhorn has noted,

> One method of resolving the difficulty is to state that questions of 'law' are subject to full or independent judicial review, that questions of 'fact' are subject to limited judicial review, and to classify the question at issue as 'fact' or 'law,' depending on whether the scope of review should be independent or limited. This may be termed the 'labelling' approach, i.e., after the court decides what scope of review it will utilize it attaches the proper label.

W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 297–98 (7th ed. 1979). Even so, the review of questions of "law" apparently does not rise to scrutiny of the "trial de novo" type utilized in Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 893–96 (D.C. Cir. 1978).

For a sampling of the scholarly debate on this subject, see J. DICKINSON, ADMINISTRATIVE

ence in the courts and in journals, Professor Davis can still protest that only he understands the meaning of these various deference tests.[323] In practice, unless a particular statute clearly specifies otherwise,[324] one of two standards of the degree of judicial scrutiny is typically applied: "substantial evidence" if it is a formal decision being reviewed; "arbitrary and capricious" if it is informal.[325] Though they are considered to be quite different, analytically the difference between the two definitions lies not in their structural elements but in the severity of the scrutiny "mood" with which the courts apply them.[326]

The equal protection cases come down to the same spectrum of moods. At the level of highest deference are the cases in which the Court has said that classifications will be upheld if "any conceivable set of facts" could support them,[327] a super-deferential test that invites a court to stretch to supply both valid purposes and supporting means-end justifications.[328]

At the level of strictest scrutiny, deference is barely discernible, for, after a court announces that it is applying that standard, it is difficult to find a regulatory survivor. In between are rational-basis reviews and middle levels of scrutiny.[329] Once a court decides that a

---

JUSTICE AND THE SUPREMACY OF LAW 55 (1927); J.M. LANDIS, THE ADMINISTRATIVE PROCESS 144–46, 152–53 (1938); Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 926–27 (1943).

[323] 1 K. DAVIS, TREATISE, *supra* note 299, § 5.09, at 353–54.

[324] *See* APA § 706, 5 U.S.C. § 706(2)(f) (1982).

[325] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414–15 (1971) (describes circumstances where de novo review is appropriate); *see also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 802–03 (1978).

[326] *See supra* note 226 and accompanying text.

[327] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 426 (1961); Dandridge v. Williams, 397 U.S. 471, 485, *reh'g denied*, 398 U.S. 914 (1970). The inherent oxymoron in the terms is apparently lost upon the Court. How does one "conceive" a fact? *McGowan* appears to be a straight substantive due process case masquerading as equal protection. In a law prohibiting certain activities on Sundays, it is the "Sundayness" of the statute that is being attacked, not the classification of certain businesses. But Sundays do not have enforceable rights, so the case is pushed into the mold of equal protection. The fact that the law was upheld, of course, does not change the point. *See* L. TRIBE, *supra* note 268, § 8-7, at 585–86.

[328] Indeed it seems to place an almost impossible burden of proof upon the party seeking to challenge legislation, and in fact is arguably similar to the "clearly erroneous" standard of rule 52(a) of the Federal Rules of Civil Procedure, which is the standard that an appellate court uses when reviewing the factual determinations of the trial court. FED. R. CIV. P. 52(a). When the Court adopts such a posture, it appears willing to entertain *any* argument that might sustain the enactment under review, however attenuated the suggested "reasonable basis" may be. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (a classification does not violate the equal protection clause "merely because it is not made with mathematical nicety or because in practice it results in some inequality").

[329] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970), *reh'g denied*, 401 U.S. 903 (1971);

case involves fundamental rights or suspect categories, the level of test is automatically designated as, consequently, are the results.[330] The choice of test formulae, based on gut judgments of the affected interests, is a semaphore for what will follow.

How to make sense out of this semantic chaos? One method would be to say that the self-fulfilling choice of which test to apply is merely an indicator of organic judicial decisionmaking in which the choice of test, and a court's consequent activism or deference, is made according to whose team is at bat.[331] For the sake of the integrity of the legal system, however, it is important to seek further rationales to explain and guide the courts' actions.

The equal protection cases suggest the way in which the courts can define such a rationale. The difference between the strict scrutiny and low scrutiny code-word tests is not that in the latter situations irrationality is avowedly tolerated up to the limit of lunacy, but, rather, that judicial perceptions *of what is at stake* differ. In strict scrutiny situations, the courts accept the proposition that discriminations based upon certain constitutionally suspect criteria *per se* impose drastic and highly significant burdens on individuals affected.[332] That recognition implicitly foretells an ultimate tilt toward the individual. Where low-level arbitrariness reviews are applied, the courts implicitly are looking ahead to the balance and saying that the burden on the individual is not much, in comparison to legitimate governmental interests.[333] In between—as in gender and illegitimacy cases where courts feel subjectively that the classes are not exactly suspect, but that the rights involved are rather important—the most difficult balancing takes place. Here, the code words and semaphores

---

Craig v. Boren, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977). In the gender cases, the Court has carved out an "intermediate" standard of review, which requires that a classification be substantially related to important purposes. *Craig*, 429 U.S. at 197–98.

[330] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

[331] This danger currently shadows the judicial nomination process, as noted in Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

[332] In suspect classification cases, the question of the severity of the individual burden is related to the Court's implicit recognition of the immutability of race. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). The Court has also noted the stigmatization associated with a classification based upon such an unalterable (and ultimately erroneous) criterion. Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879). When weighed against the imposition of such a significant and drastic burden upon the citizen, the governmental interest requiring such a classification must be compelling indeed.

[333] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, *reh'g denied*, 450 U.S. 1027 (1981).

do not provide a clear understanding of how the interests of the individual should be gauged in comparison to those of the state.[334] It is not enough, however, to say that the judicial choices are shaped by a court's view of what is at stake. Such a position merely restates the semaphore phenomenon.

Analytically, however, the courts at every level of scrutiny seem to be applying a benefit-burden, means-end balance that is directly analagous to the modern three-part procedural due process formula established in *Mathews v. Eldridge*.[335] In that case, the procedural balancing of interests weighed: 1) the substantiality of the affected individual's interest measured in terms of the procedural burden, loss, or effect attributable to the government's choice of how much process to give; 2) the government's interest in proceeding in the particular chosen manner that so affects the individual; and 3) the risk of error involved in that choice of procedure.[336]

Application of the *Mathews* test to equal protection decisionmaking in substantive terms explains how, even at the highest level of scrutiny, with a racial classification, the courts could well uphold a clearly discriminatory statute. Take for example a law requiring that all black American school children be inoculated for sickle-cell anemia. The courts would consider the burden on black school children, including the burden posed by the racially based setting-apart, and would weigh it against the government's interest in avoiding a terrible disease, along with the risk that this classification was erroneous or illogical (sickle-cell strikes only black children).[337] The statute thus would probably survive this balancing because: 1) the racial classification does not weigh so invidiously as in other contexts; 2) the state's interest in preventing disease is significant; and 3) the applicable scientific data is reliable.

---

[334] Although the phrase "*compelling* state interest" gives a pretty good indication, the signals are clear enough in Frontiero v. Richardson, 411 U.S. 677 (1973) (applying "strict scrutiny" to invalidate a sex-based classification). The Court, however, has retreated from this position, adopting the "intermediate standard" of review for gender cases. In Craig v. Boren, 429 U.S. 190, 197–98 (1976), *reh'g denied*, 429 U.S. 1124 (1977), the Court noted that a classification based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

[335] 424 U.S. 319 (1976); *see also* Dixon v. Love, 431 U.S. 105, 112–13 (1977). The three elements offer a simpler way of implementing the analytical review set out in Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 680 n.95 (1977).

[336] *Mathews v. Eldridge*, 424 U.S. at 335.

[337] This balancing also would appear to include a weighing of less drastic means against "necessity" considerations.

This balance also explains why the *LaFleur* Court indicated that it might well sustain an irrebuttable governmental rule terminating pregnant teachers for the last few weeks before delivery, even without individual medical hearings.[338] In such cases, the burden of near-term termination was slight and the school's interest in certainty of planning for hiring substitutes was more substantial, given the relatively low risk of error in predicting (even without medical exams) that women teachers past their eighth month are likely to need substitutes very soon.[339]

The Court, in other words, has not been reluctant to apply the useful elements of the *Mathews* balance in contexts far removed from that case's purely procedural setting. In 1982, for instance, the Court followed the elements of the *Mathews* analysis, applied to a substantive setting, in *Logan v. Zimmerman Brush Co.*[340] In that case, the majority of the Court (in a combination of opinions) was willing to strike down a state statute's restrictions on hearing cutoffs at the lowest level of review, based in part on benefit-burden, means-end reasoning. Not only did the dismissal of filed claims (where the agency itself had failed to call a required timely hearing) impose a heavy burden on the individual petitioner, but the interest of the state in cutting down caseloads or expediting processing (clearly proper purposes) was not sufficiently significant (indeed trivial) in light of the risk of erroneous deprivations in a system amounting to chance. Like the over-inclusiveness analysis,[341] this balancing struck down the determination not because it might not actually serve a purpose, but because its "arbitrary" randomness was not sufficiently related to a valid purpose, in light of less drastic and more consistently logical means available to achieve the purpose.[342]

---

[338] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 n.13 (1974).

[339] *Id.*

[340] Logan v. Zimmerman Brush Co., 455 U.S. 422, 434–35 (1982). Note that *Zimmerman Brush* also looks very much like a substantive due process case rather than an equal protection decision. The government-imposed burden involved a single party in idiosyncratic circumstances. The Court certainly felt that the statute was substantially unfair to Logan, but used equal protection instead of substantive due process. In all likelihood, this analysis reflected the Court's traditional aversion to the latter term.

[341] *See supra* note 320 and accompanying text.

[342] This is similar to the reasoning in Reed v. Reed, 404 U.S. 71, 76 (1971). Of course, a fundamental problem with the agency's interpretation in *Zimmerman Brush* was that it treated similar individuals dissimilarly for no good reason, a familiar definition of under-inclusiveness. In our present terms, it could be said that the individual burden on Mr. Logan was not only that he was being deprived of his right to administrative process, but also that he bore the burden or stigma of being singled out for loss with no fault or causation nexus.

There is a very real danger that the Court's use of "cost-benefit analysis" will also become a self-fulfilling prophecy of deference, because the governmental interest so readily conjures up judicial visions of the needs of millions to weigh against the paltry interest of one.[343] Beyond shifting to the benefit-burden phrasing of the concept,[344] one answer is to say that the Court has in practice been able to give substantial weight to the interests of individuals. Another is to pose the challenge of intellectual integrity. If the Court is going to decide cases according to organic inclination and gut semaphores, nothing will deter it; but if the analysis is presented in terms of its constituent elements by counsel, with explicit balancing of explicit considerations, then the colloquy between bench and bar in each case will necessarily be targeted at a higher and more articulated level, with consequent improvement in judicial process as a matter of course.

Abdication is rather to be feared: the entropic tendency of judges to zone out when they encounter the issues of deference and official discretion. That is a real danger of semaphore thinking.

Courts, if they acknowledge their structural role as integral parts of government rather than mere appendages of the current political marketplace, must then confront the fact that their definitions of deference will have systemic political implications whether or not they exercise a substantive review function.[345] A blunt decision to abstain—as in *Dandridge* where Rehnquist used the language of the anti-*Lochner* backlash to achieve a *Lochner* result[346]—can be more

---

[343] In Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960), Justice Black noted:

> The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals. If the need is great, the right of Government can always be said to outweigh the rights of the individual. If "balancing" is accepted as the test, it would be hard for any conscious judge to hold otherwise in times of dire need. And laws adopted in times of dire need are often very hasty and oppressive laws . . . .

Id. at 878.

Justice Black further noted that these concerns are not unique in time or place to the modern constitutional state: "Misuse of government power, particularly in times of stress, has brought suffering to humanity in all ages about which we have authentic history." *Id.* at 879.

[344] *See supra* notes 236–41 and accompanying text.

[345] As Professor Tribe notes:

> [W]holesale abdication [by the Court] to the political process [is unjustified], since there exists no type of legislation that can be guaranteed in advance to leave important constitutional principles unimpaired . . . and there is . . . no way for courts to review legislation in terms of the Constitution without . . . making difficult substantive choices . . . .

L. TRIBE, *supra* note 268, § 8-7, at 583–84.

[346] Dandridge v. Williams, 397 U.S. 471, *reh'g denied*, 398 U.S. 914 (1970) (where the state regulation provided for a $250 per month family limit on AFDC grants):

"political" than a court's straightforward decision to exercise its review role in a substantive manner.

The challenge indeed is one of judicial integrity. If judges can be trusted to act more often than not according to the high ethical principles expected of the watchdog branch of government, the only branch charged with maintaining a rational continuity of principles despite the storms and tides of popular majoritarian politics, then there is no danger in allowing them to apply, with due deference, the traditional tests of validity for governmental actions. If, as some have argued, even the highest court in the land has abandoned all but a pretense of principled analysis, then the danger is great with or without substantive review, because the Court will abstain, or scrutinize without calling it substantive review, depending on the Justices' organic political inclinations in each case.[347]

Given the fact that all courts and commentators appear to agree that courts ultimately must be able to censure the most extreme cases of substantive arbitrariness, the burden would seem to be on those who would limit substantive judicial review to show logically where the boundary lies—not an easy task.[348] Failing such a line-drawing, it is far more fitting for members of the legal profession to hold to the operating presumption that courts will be guided by principle rather than politics, avoiding both the anti-state politics of the *Lochner* Court's review and the establishment politics of latter-day abstention decisions.[349] From that presumption, a coherent system of democratic checks and balances can flow. If there is to be an irrebuttable presumption in judicial review of governmental action, let it be that one.

> For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history.

Id. at 484 (citations omitted). The rhetorical "ghost of *Lochner*" will not go away. *See* Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1963).

[347] *See supra* note 304, and accompanying text.

[348] Professor Tribe writes:

> [E]ven deferring to others . . . [entails an assumption of deciding] when to intervene, as the Court obviously has done throughout its history. As long as judges do not fully and irrevocably repudiate the mission of *occasionally* rejecting majoritarian political choices, there is no honest way for them to escape the burdens of substantive judgment *in every case.*

L. TRIBE, *supra* note 268, § 8-7, at 585 (emphasis original).

[349] In some cases, this may amount to the presumption that "the Emperor *must* be wearing clothes."

3. The Bench's Vision of Democracy

A court's stance on review in part reflects its conception of what a legislature is. If the court regards government, especially legislative decisionmaking, as an intricate and legitimate brokerage system for the array of competing market forces and pressure groups, visible and invisible, that constitute modern democratic process, then every decision can be seen as so complex and multi-purposed that meaningful judicial means-end review seems analytically impossible[350] unless the courts straightforwardly take on the role of a superlegislature, a role that most agree is not fitting and proper.[351] Accordingly, some jurists have argued that courts should accept the results of legislative action as given, without scrutiny as to purpose or means-end review. This "marketplace" characterization of governmental process has much basis in reality to support it. No one who has watched the legislative journey of an agricultural commodity credit bill, say, or proposals for immigration reform, veterans preferences, auto safety, or environmental regulation can have any illusions that the numerical majority of legislators who come together to pass a particular bill have any unity of vision, purpose, or interest with regard to a proposal,[352] not even illusions that the discrete merits of each bill have a necessary part to play in its passage.[353] Yet, if the

---

[350] As Dean Bice describes it, the brokerage model "is rooted in skepticism about the reality or even the possibility of public values. It posits that the only intelligible conception of the 'public' good is the maximum feasible satisfaction of *individual* preferences. Thus, assuming that the legislature operates as a proper market, legislation is, by definition, an accurate expression of that maximum satisfaction." Bice, *supra* note 22, at 19 n.37 (citation omitted). Confronted by such a legislative system, any attempt by the Court to divine a unitary legislative "purpose" or "intent" is hopeless. Thus, any meaningful means-end rationality review is unrealistic, if not futile.

[351] The term "superlegislature" apparently originated in Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). It has since flourished to the point of becoming a thorn in the side of those who would challenge "arbitrary" legislative action, and is rapidly growing into a member of the "judicial buzzword" genus of semantics. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731 (1963); New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 478–79 n.2 (1981) (Stevens, J., dissenting); *see also* Hodel v. Indiana, 452 U.S. 314, 332–33 (1981); Plyler v. Doe, 457 U.S. 202, 242–54 (1982) (Burger, C.J., dissenting).

[352] To this extent, it is useful to distinguish between "purpose" and so-called "legislative intent," consisting of the subjective intention of individual legislators, who together constitute the "collective legislative mind," a mind the depth of which many scholars feel cannot be plumbed. *See* Frankfurter, *supra* note 282, at 530; Radin, *supra* note 284, at 869. *Purpose* is the aim of the legislation; *intent* is the aim of the legislator.

[353] *See* Leedes, *supra* note 304, at 644.

courts do not insist that government's actions be rational, at least in the sense of achieving a purported public end, judicial review makes little sense.

An alternative model less cynically pictures government much as it is taught in eighth grade civics, as a "social-good" mechanism designed and motivated to accomplish particular purposes for the public good.[354] If this model were true, then substantive means-end review would make sense, because the courts' role in means-end review would simply be to hold the government to its own avowed objective.

The choice left to the courts, however, is more subtle than to decide which model of governmental action is more realistic, the marketplace arena or the social-good model. Making such a decision is a fit job for political scientists (who usually follow the brokerage analysis).[355] The day-to-day coin of the legislative marketplace, they argue, is comprised of money, media attention, votes, deals, and alliances, and only a Pollyanna could reduce the process to the bland caricature reflected in the civics books. Although it is difficult for the men and women who sit on the bench to believe in the day-to-day accuracy of the social-good model, it should be harder still for them to adopt the brokerage model as the acknowledged basis of their judicial review activity.

In practice, courts seem destined to choose a pragmatic paradox: while the political process may be merely an arena of contending forces, judges must presume, sometimes against the evidence of their senses, that each law is intended to achieve some particular modicum of public good, and is to be reviewed accordingly.[356] Thus, the courts fulfill a real check-and-balance role that lifts the whole structure above the mire of the political battlefield. If the courts surrender their expectation of governmental rationality, however, then there is no focus within the system for enforcement of first principles, except where particular specific provisions fortuitously exist in constitutions, or in statutes which can be changed at the stroke of a legislative clock. If the courts persist in acting as if laws

---

[354] As posited by Professor Michelman, the "social good" model involves the legislature as "the forum for identifying or defining [objectives], and acting toward those ends. The process is one of mutual search through joint deliberation . . . . Moral insight, sociological understanding, and goodwill are all legislative virtues." Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 149 (1978) (footnote omitted).

[355] *See, e.g.*, J. CHOPER, *supra* note 304.

[356] *See supra* note 349 (the "Emperor presumption").

were written in order to accomplish their purported ends, then the potential of substantive review keeps the whole system honest. Those who argue that legislatures are too complex to be reviewable, and that legislative means-end choices are political questions, implicitly consecrate the result of political combat in which might makes right.[357] They also disrupt the delicate fundamental balance of democracy between respect for the individual and the grant of otherwise overwhelming power to the machinery of the majority.

4. Will of the Wisp, and Other Tests

Despite the often-repeated judicial aversion to substantive rationality review, even the most deferential judges would probably admit that some governmental irrationalities in the extreme case must be substantively reviewed. Thus, decisions based on bad faith,[358] or bordering on lunacy, will be judicially scrutinized and invalidated. The courts that declare that governmental decisions based on "will of the wisp reasoning" would be void[359] are accepting a standard of invalidity based upon means-end rationality.

The will of the wisp is not a question of procedural due process, but of the lack of sufficient relationship between facts and some determining principle established to achieve the public purpose.[360] Analytically, the basis for judicial acceptance of substantive reviews in such extreme cases is not some free-floating, exceptional form of *sui generis*, constitutional review jurisdiction, but just a recognition of substantive due process in particularly vivid circumstances. The acknowledgment that such extreme cases deserve substantive review, however, thereby concedes the fundamental existence of a substantive rationality review jurisdiction.

When surveyed analytically, the extensive case law of judicial review, as indeed the constitutional structures that lie behind article III review of governmental actions, both repeatedly affirm the ex-

---

[357] "The simple plan, That they should take who have the power, And they should keep, who can." Meeker v. City of East Orange, 77 N.J.L. 623, 638, 74 A. 379, 385 (1909) (quoted with aversion). This is the problem invited by the Linde, *supra* note 22, and Leedes, *supra* note 304, analyses.

[358] *See, e.g.*, United States v. Board of Educ. of Chicago, 744 F.2d 1300, 1308 (7th Cir. 1984) (alleged bad faith of Department of Education for failing to fund desegregation order).

[359] United States v. 2,606.84 Acres of Land, 432 F.2d 1286, 1290 (5th Cir. 1970), *cert. denied*, 402 U.S. 916, *reh'g denied*, 403 U.S. 912 (1971); United States v. 49.79 Acres of Land, 582 F. Supp. 368, 373 (D. Del. 1983) (quoting United States v. 2,606.84 Acres of Land, 432 F.2d 1286, 1290 (5th Cir. 1970)).

[360] *2,606.84 Acres of Land*, 432 F.2d at 1290.

istence of some kind of meaningful judicial backstop against arbitrary governmental decisions. The judicial protection would be superficial and feckless if it were limited to purely procedural matters, abdicating review of substantive merits through an excess of deference. Instead, viewed over the years, the arguments over substantive rationality review repeatedly devolve into discussions merely over the degree of deference, not over the question of whether basic reviewability exists. Presented in those terms, rationality review becomes more straightforward, less mysterious and suspicious, and eminently practicable.

V. SUMMARY

The "arbitrary and capricious" test is so widely recognized in general terms as an ultimate limit upon governmental actions that it is surprising how little it has been analyzed in specific terms. What is its source, statute or constitution? Where does it properly apply? What are its components and logic? How can courts take on the job of actually applying the test without upsetting separation of powers? These questions may well explain why courts have been so hesitant in undertaking straightforward applications of the arbitrary and capricious test in substantive judicial reviews.

This Article attempts to pin down the arbitrary and capricious test through the vehicle of eminent domain. Using administrative, constitutional, and eminent domain cases in which the concept of arbitrariness can be scrutinized and tested, this Article has sought to demonstrate the constitutional status of the arbitrariness test, as it exists with or without particular statutory authority. The analysis splits substantive judicial review into different diagnostic categories—inquiries into the *authority* for governmental action, proper public *purpose*, a *means-end* analysis, and the assessment of *individual burdens* in the takings area, as well as procedural review issues. This analysis narrows down the arena in which the arbitrary and capricious standard can be applied most usefully, and demonstrates its practical application through an inquiry into the rational relationship between means and ends.

Eminent domain case law reflects the haziness in our general understanding of substantive judicial review. Police power condemnation is one of those areas in which the arbitrary and capricious test is regularly acknowledged as an element of judicial review, but rarely actively applied. Review of eminent domain case law through the perspective of the diagnostic categories developed here provides

a foundation for substantive rationality review of conflicts between public power and private rights.

The analysis therefore addresses fundamental issues of democratic governance. On one hand, judicial deference to official decisions is a necessary feature of stable tripartite government. Courts should not arrogate to themselves the role of final decisionmaker except in extreme cases. On the other hand, if courts elevate deference to the level of substantive nonreviewability, they abdicate the equally important principle of judicial limits on public power. Between the two extremes lies a practical middle ground. Courts must recognize both the presumption of validity of governmental decisions, and the realistic possibility of rebutting it. The arbitrary and capricious test, as a democratic backstop against occasional erratic excesses of government, represents a functional and balanced opportunity for striking that balance.

If, as analyzed in this Article, federal courts are willing to allow individuals a realistic opportunity to raise serious particular questions about the substantive rationality of governmental condemnations under the terms of the arbitrary and capricious test, they thereby implement in practice a longstanding and important precept of American jurisprudence. Such substantive review fits logically into the fabric of judicial review, including the patterns of constitutional review in recent federal cases and practical but unused provisions of the federal Administrative Procedures Act. If, however, judges continue to treat the arbitrary and capricious test as an amorphous totem inappropriate for active judicial use—in effect preventing individuals from meaningfully litigating the allegation of substantive irrationality of governmental decisions—the long-term consequences within our legal system are likely to be felt far beyond their effects on certain parcels of land.